Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

SALVATORE A. BONO,

Petitioner,

v.

GEOFFREY M. PARKINSON and THE LAURA J. NILES FOUNDATION, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Judge Seybolt presided over a New Jersey state court proceeding that would adjudicate Laura Niles' rights as well as the rights of her nephew, Petitioner Salvatore Bono. From the beginning of the case and throughout the proceedings, Seybolt acted in concert with Bono's opponents. While the New Jersey proceeding was being manipulated to deprive Bono and his aunt of their property rights, Bono sought justice for himself and his aunt in federal court and, *inter alia,* made claims in that case against Judge Seybolt personally. Judge Seybolt abandoned any pretense of impartiality and adopted arguments made by other defendants in the Federal Action who were also opponents of Bono in the New Jersey proceeding over which Judge Seybolt continued to preside. This Court has established that a judicial officer must remain impartial and that the due process clause guarantees that parties have a right to be heard by an impartial tribunal before property protected against deprivation by the state may be taken away from a litigant. Should the Petition be granted to address whether a litigant's due process right to a hearing before an impartial tribunal is violated when a judge exhibits clear bias against a litigant appearing before the judge and joins forces with parties that are opposing the litigant in the case before the judge?

2. Judge Seybolt repeatedly ignored applicable New Jersey rules and procedures when he entered a default against Bono, struck Bono's pleadings, barred Bono and his counsel from appearing before the court, and entered a judgment awarding damages when no request for damages

was part of any pleading. This Court has established that parties have a due process right in the rules and procedures set up by a state to resolve disputes. Should the Petition be granted to consider whether Judge Seybolt's repeated rules violations deprived Bono of his due process rights and whether the cumulative of effect of the repeated rule violations also deprived Bono of his due process rights?

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The decision of the Supreme Court of New Jersey denying Bono's Petition for Certification is unreported. (App. A1.) The decision of the Superior Court of New Jersey Appellate Division is unpublished. (App. A3.)

JURISDICTION

The Supreme Court of New Jersey entered a final decision in this case on September 6, 2002 when it denied Bono's Petition for Certification. (App. A1.) This Court extended the time for filing a petition for writ of certiorari to January 3, 2003. This Court has jurisdiction under 28 U.S.C. § 1257(a) because the New Jersey appellate decisions affirming the judgment of the Superior Court of New Jersey, Chancery Division, Probate Part, Warren County court decision violated Bono's procedural and substantive due process rights under the Fourteenth Amendment of the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section One (App. A94.)
New Jersey Code of Judicial Conduct, Canon 3, section C(1)(a) (App. A99.)
New Jersey Court Rule 4:43-2(c) (App. A95.)
New Jersey Court Rule 1:6-3(a) (App. A98.)

INTRODUCTION

This case is a prime example of what happens when judicial officials, who are supposed to be impartial and impart equitable justice to all, abandon those principles and take sides in the controversy they are charged with adjudicating impartially. Geoffrey Parkinson ("Parkinson"), a stockbroker, along with others, concocted a scheme to illegally seize full control of the considerable assets of elderly persons, including Henry Niles ("Henry") and his sister Laura Niles ("Laura"), by subverting and manipulating the judicial system. When Laura, an elderly woman, attempted to regain control of her finances from Parkinson, Parkinson manipulated the New Jersey court system to thwart her efforts and to displace Petitioner Salvatore Bono ("Bono"), Laura's nephew, who was her chosen trustee and advisor.

Parkinson, with the connivance and support of the New Jersey courts, started nothing less than a probate proceeding against Laura while she was still alive. After Laura tried to dismiss him as her advisor, Parkinson filed a verified pleading in New Jersey state court falsely claiming that Laura was incompetent and seeking to have Bono removed as her trustee and advisor. Judge Harry K. Seybolt ("Judge Seybolt" or "Seybolt"), who presided over the New Jersey proceeding brought by Parkinson, knowingly accepted Parkinson's fraudulent pleadings and participated in Parkinson's scheme to deprive Laura of her rights and punish Bono for his attempt to defend his aunt and himself. Parkinson obtained an *ex parte* appointment of a pre-selected guardian, Michael S. Selvaggi ("Selvaggi"), who was supposed to represent Laura's interests but actually advocated for Parkinson. Selvaggi filed a false guardian report but, even though 18 witnesses filed sworn statements establishing the falsity of Selvaggi's assertions,

Selvaggi's report was accepted unquestioningly by Judge Seybolt, who complimented Selvaggi's work on the record. Based on Selvaggi's inaccurate report and without holding a hearing, Seybolt removed Bono from the positions Laura had given him.

Hoping to protect his and his aunt's interests in spite of the manipulation taking place in the New Jersey court system, Bono filed suit in federal court against Parkinson and others, including Judge Seybolt, asking the federal court to intervene. Seybolt then publically joined forces with other defendants in the Federal Action who were also Bono's opponents in the New Jersey case over which Seybolt was presiding. Judge Seybolt went so far as to officially adopt arguments made by others in the Federal Action. (App. A92.)[1] Seybolt then dropped all pretense of impartiality and became outwardly hostile to Bono.

The issue presented here is whether a litigant like Bono may be deprived of property rights without a hearing before an impartial tribunal. This Court has previously held that the Due Process Clause requires that a party's rights be adjudicated by an impartial arbiter. Bono had his property taken away and a million dollar judgment entered against him by a judge who, from the beginning, exhibited obvious bias against him and blatantly took sides against him in other pending litigation where the judge was a party. The issue is not whether, by suing a judge, a litigant may force the judge to recuse himself or herself. Instead, the Petition asks whether, in addition to clear

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[1]Petitioner asks this Court to take judicial notice of the pleadings and documents contained in the court's file in *Bono v. Barnowsky, et al.*, No. CV 99-3688 (TCP), in the United States District Court for the Eastern District of New York. *See* Fed. R. Evid. 201.

bias evident from the inception of the case, Judge Seybolt's own choice to appear and join forces with Bono's opponents in the Federal Action disqualified him in the state proceeding under principles of due process.

The Petition should also be granted to consider whether Bono's due process rights were violated by Judge Seybolt's wilful refusal to follow the applicable procedural rules and safeguards. Judge Seybolt gave Parkinson and his collaborators *carte blanche* to wrest control of Laura's fortune from her and her chosen representative, all in clear violation of New Jersey law and in complete disregard for the rights of Laura and her nephew, Bono. Seybolt allowed Parkinson to set a hearing without giving the required notice, entered a default against Bono, struck Bono's pleadings, refused to allow Bono to participate in any proceedings, and awarded damages against Bono even though none were requested in the pleadings. The New Jersey appellate courts ignored these multiple violations of due process and Parkinson's manipulation of the system. The New Jersey court system completely failed to do justice to Bono or Laura in this case, and only this Court has the power now to right those wrongs.

STATEMENT OF THE CASE

A. Geoffrey Parkinson Gains Control Over Millions in Assets of Wealthy Clients and Collects Large Fees by Establishing Foundations and Trusts for Henry, Laura, and Others.

Geoffrey Parkinson was the financial advisor to Laura and her brother Henry and named himself as a director of charitable foundations he set up for Laura and Henry. (B9T:157-22 to 157-24; B18T:247-13 to 247-20.)[2] Parkinson arranged for the creation of trust instruments giving him control over his clients' financial affairs, including Laura and Henry, while generating substantial fees for him as a trustee and for his financial advisory company. (B9T:157-22 to 157-24; B12T:32-1 to 33-25;129-1 to 132-25; B13T:22-1 to 24-25;98-1 to 101-20.) Parkinson was appointed as trustee of a revocable trust set up by Laura and two Charitable Remainder Unitrusts with Laura as grantor and settlor. (Da242-276.) Parkinson also had himself and a friend, Leland Selby, named as a directors of the Laura J. Niles Foundation, the residuary beneficiary under various trust instruments. (Da246). The Trusts and the Foundation together controlled over fifteen million dollars in assets, generating substantial fees for Parkinson and others involved in the scheme.

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[2]Citations to the Appendix are cited as "App. __." Other citations are to the record on appeal in the Superior Court of New Jersey, Appellate Division.

B. Parkinson Secretly Tries to Get Appointed as Henry's Conservator in an Involuntary Proceeding to Maintain Control Over Henry's Assets and Keep Henry From Getting Married.

In or about 1990 or 1991, Parkinson approached Laura and obtained her consent to having a limited judicial conservator appointed to help her brother Henry with his financial affairs. (B9T:176-8 to 178-22; B9T:182-19 to 183-23.) But Parkinson did not file that Petition and instead, without telling Laura, he filed an involuntary petition designed to keep Parkinson in control of Henry's assets and to prevent Henry from marrying Serena Niles, Bono's mother. (B18T:218-25 to 219-25, 220-9 to 220-23; B18T:228-21 to 229-30.) Parkinson's gambit was successful. The marriage was delayed for eighteen months, and a New York court appointed a conservator, stripping Henry of all control over his assets, leaving him with only a set monthly allowance that could be spent without the conservator's permission. (B22T:181 to 183.)

C. Laura, Alarmed by Parkinson's Conduct, Tries to Regain Control of her Affairs.

Having seen how he stripped her brother of control over his affairs, Laura naturally became concerned about Parkinson's role in administering her own affairs. Parkinson had already become hostile to Laura, falsely claiming she was spending too much and was going to run out of money even though she had $15 million in assets and no dependents. (B18T:32-18 to 35-17; B14T:89-9 to 89-19; B19T:28-2 to 29-4; B19T:30-13 to 30-15.) Parkinson also refused to make changes to testamentary documents she requested. (Drejka Depo II: 276-19 to 277-16; Drejka Depo II:289-16 to 290-11.) Laura retained a law firm to investigate her assets and advise her with respect to the

appropriate structuring and management of her financial affairs. (B5T:6-8 to 7-1.)

D. Laura Discharges Parkinson as Trustee and Replaces Him With her Nephew, Bono, But Parkinson Refuses to Relinquish Control.

At Laura's request, the law firm drafted documents to discharge Parkinson as trustee and replace him with Bono, as well as make other changes to her estate plan, and these wishes were confirmed by Laura in documents executed in her own handwriting. (Bda 426-431.) Laura told Parkinson that she was discharging him, but he refused to resign as a director of the Laura J. Niles Foundation, Inc. (B20T:31-3 to 31-14.) Laura then established a New York corporation known as the Niles Foundation, Inc. which was named as the replacement residual beneficiary of her various trusts. (Bda394-401; B20T:12-11 to 23; B20T:46-20 to 47-2; Da135-174; Da71-78.) The ceremonies where the documents were signed by Laura were videotaped, and neither Bono nor Serena Niles, her sister in law, were present. (B7T:110-7 to B7T:111-4.)

E. Parkinson Files a Knowingly False Verified Complaint in the New Jersey State Court.

On January 22, 1998, Parkinson filed a Verified Complaint in his individual capacity in the Superior Court of Warren County, New Jersey to have Bono removed as trustee, falsely claiming Bono coerced Laura into changing her will and that she was incompetent. Parkinson spuriously alleged that Laura's decision to discharge him as trustee and to change her trust instruments were the result of undue influence by Bono and a conflict of interest by Laura's attorneys. He further illegitimately claimed that Laura suffers from organic brain

syndrome and is demented. (Bda 40.) Parkinson's duplicity in filing this document is demonstrated by the fact that he attached to the complaint trust amendments, advisory fee contracts, and other agreements entered into between Parkinson and Laura *after* the date he claims she suffered from alleged mental impairments. (Complaint Exhibits; B10T:63-23 to 66-20.)

F. Parkinson, in an Illicit *Ex Parte* Proceeding, has His Chosen Guardian Appointed for Laura.

On January 22, 1998 Parkinson, ignoring the applicable New Jersey rules, made an *ex-parte* motion for appointment of his chosen Guardian Ad Litem ("GAL") for Laura. (Bda1-9.) Parkinson pre-selected Selvaggi as his chosen guardian by typing his name in the order presented to the court for entry, and even though Parkinson was adverse to Laura and no hearing was held, the New Jersey court signed and entered the *ex-parte* order prepared by Parkinson naming Selvaggi as GAL to Laura. (Bda3.)

Selvaggi fabricated a report loaded with false and misleading statements supporting Parkinson's position. Eighteen witnesses submitted sworn affidavits stating that the report misquoted them and/or omitted material information and other witnesses made it clear that Selvaggi intentionally distorted and falsified statements they had made to him. (Bda386-393.) The court refused to disregard the report and denied Bono's request that Selvaggi be forced to release his handwritten notes. (Bda76.) Selvaggi's partisan support of Parkinson was made evident when, after Laura slipped into a coma almost two years after the case was filed, Selvaggi waived the attorney-client privilege between Laura and her attorneys so Parkinson could discover notes and documents evidencing confidential communications between Laura and her attorneys.

(Bda115-137; Bda126) Selvaggi, Seybolt, and Parkinson also acted carelessly and failed to properly provide for Laura's medical needs.

G. Judge Seybolt Orders That a Hearing be Held on the Issue of Undue Influence and Summarily Removes Bono as Trustee.

Based on Selvaggi's false report and despite clear video-taped evidence that Laura was competent when she discharged Parkinson and replaced him with Bono, Judge Seybolt found a *prima facie* case of undue influence and directed that a plenary hearing be held to resolve that issue. (Bda70-72.)[3] The Laura J. Niles Foundation, which Parkinson continued to control despite Laura's efforts to discharge him, then filed a Verified Complaint seeking relief as against Serena Niles only. (Bda11-112, 152-156)

Judge Seybolt then summarily removed Bono as trustee under the three trusts. (Bda71, Bda244) In addition, without any hearing, Judge Seybolt directed that Bono be permanently removed as a director from the Niles Foundation, Inc., a New York corporation which is subject to oversight by the New York Courts. (App. A70.)

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[3]Selvaggi also recommended approval of Parkinson's accounting even though Parkinson himself admitted it was erroneous. (B13T:79-1 to 83-25). In addition, although Parkinson was no longer a fiduciary to Laura or the three Trusts, he submitted objections in his own name to the accounting and supplemental accounting by Bono though he obviously had no standing to do so. (Bda94.)

H. Bono Seeks Justice for Laura, His Mother, and Himself by Filing an Action in Federal Court Against Seybolt and Others.

Having seen Parkinson's ability to manipulate the New Jersey courts to his advantage, Bono sought the assistance of the federal court system in his efforts to protect Laura and himself from Parkinson. On June 29, 1999, Bono commenced an action, *Bono v. Barnosky, et al.*, No. CV 99-3688 (TCP), in the United States District Court for the Eastern District of New York (the "Federal Action"), against Seybolt, Parkinson, and others seeking damages and injunctive relief for violating Bono's civil rights and for corrupt acts alleged to have injured Bono in his person and property in violation of the RICO statute. The essence of the Federal Action was that Judge Seybolt became a voluntary participant in a scheme by Parkinson and others associated with him to control the affairs of wealthy elderly individuals like Laura and Henry and to manipulate the legal system to maintain this control over their fortunes. The scheme described in the Federal Action involved the prosecution of conservatorships or similar proceedings on the basis of false claims of incapacity, the submission of baseless doctor's reports, the appointment of biased guardians or conservators who act in concert with them and are appointed *ex-parte*, documented felony acts, and other violations of law.

I. Judge Seybolt Officially Joins in Pleadings Filed by Parkinson and Other Defendants in the Federal Action While Continuing to Preside Over the Niles Matter and Ruling on Bono's Conduct.

In the Federal Action, Judge Seybolt officially aligned himself with the other defendants opposing Bono's requests for relief. Judge Seybolt "join[ed] in the motion to dismiss [Bono's] RICO allegations" made by other defendants and in the "brief filed by Michael Loprete, Esq." on behalf of other defendants. (A A92.) Counsel for Bono asked Judge Seybolt to recuse himself based on Seybolt's actions taking sides against Bono. (B4T:10-15 to 13-17.) Judge Seybolt denied the motion without a hearing. (B4T:16-18 to 19-7.)

J. Seybolt Removes Bono From the State Court Case by Granting Parkinson's Motion to Strike Bono's Pleadings, Even Though That Motion did not Give Bono the Required Notice.

Parkinson now connived with Judge Seybolt to prevent Bono from having any opportunity to defend his or Laura's interests in the state court proceedings. At 4:29 p.m. on September 20, 1999, counsel for Parkinson faxed to Bono's attorney a motion to strike Bono's pleadings and enter default against him, returnable at 9:00 a.m. the next day, without prior leave having been granted to submit a motion without the required 16 days notice. (Bda192-198.) The next morning, Bono was not present in court for medical reasons, and Judge Seybolt granted Parkinson's motion without addressing the defect in notice or considering less severe sanctions. (B9T:14-14 to 14-17.) Seybolt subsequently struck all Bono's pleadings and entered a default against him. (Bda199-200.) Seybolt then precluded Bono's attorney from participating in the remainder

of the trial and relieved him as counsel. (B9T:15-13 to 16-17.) Seybolt, disregarding New Jersey case law, ruled that a party whose answer is stricken forfeits any right to even be heard through counsel as to the proofs hearing and on damages. (Id.)

K. Judge Seybolt Openly Aligns With Parkinson in the State Court Proceeding.

Having successfully prohibited Bono, at Parkinson's behest, from participating in the state court case, Seybolt now turned openly hostile to Bono. In a prior opinion Judge Seybolt had stated that his "review of the videotapes of [Laura Niles'] execution of the trust modifications . . . showed a sense of humor and a surprising alertness for one who is 88 years old." (Bda179.) A few months after responding to Bono's amended complaint in the Federal Action, Seybolt looked at the same videotape and completely altered his position, stating that "the videotape clearly shows Laura was in a weakened condition and she had very little input into these wholesale changes presented to her at that time." (Bda 235; Da209.) Judge Seybolt also altered the burden of proof applicable to Parkinson's undue-influence charge, requiring Bono to rebut a presumption that undue influence occurred. (B17T:69-8 to 80-8; Bda283; Da228.) For Bono, the state case was now over, as Parkinson had successfully manipulated the outcome.

L. Judge Seybolt Awards Damages Against Bono Even Though no Such Relief Was Sought in the Pleadings and Invalidated All the Planning Instruments Laura Executed After Dismissing Parkinson, Including Laura's Will, Even Though the Will Could not be Probated Because Laura Was Still Alive.

With Bono gone, the case proceeded, Judge Seybolt continued to ignore the applicable law and rules, and Parkinson won a complete victory. Now that Bono could no longer defend himself, Parkinson asked Judge Seybolt to award damages against Bono. He also objected to the accounting and supplemental accounting filed by Bono even though he had no standing to do so because he was no longer a fiduciary to Laura or the trusts. (Bda94.) Neither Parkinson's complaint nor any other complaint filed in the state court action contained a prayer for entry of a money judgment against Bono, which was required by the New Jersey rules before a damages award could be entered. (Bda42-43.) Nevertheless, Judge Seybolt, taking advantage of the opportunity to punish Bono for seeking redress in the Federal Action, ordered Bono to pay damages, including surcharges and counsel fees, amounting to $1,170,009. (Bda286-287; Da33 to Da34). Seybolt also awarded $50,000 to Laura, who was not even a party to the case. (Bda287.) In the judgment, Judge Seybolt also found that the Will Laura executed on May 21, 1997 was invalid, even though at the time he entered judgment, Laura was still alive and no petition to probate the Will could be filed. (Bda285.)

M. The New Jersey Appellate Courts Ignore Bono's Due Process Arguments and Rubber Stamp Judge Seybolt's Inexplicable Rulings.

Bono filed a timely appeal to the Appellate Division of the Superior Court of New Jersey asking that Judge Seybolt's judgment be reversed on the grounds, *inter alia*, that Seybolt's refusal to recuse himself after aligning with Bono's opponents in the Federal Action, deprived Bono of his due process rights to have claims against him adjudicated by an impartial judicial officer, and that Seybolt's other rulings in violation of New Jersey law also deprived Bono of due process. The Appellate Division, in affirming the judgment, did not even address Bono's due process argument and merely approved of Seybolt's refusal to recuse himself, holding that it was within his discretion to do so. (App. A73.) The New Jersey Supreme Court, without comment, denied Bono's Petition for Certification on September 4, 2002. (App. A1.) Bono now asks this Court to grant his Petition.

REASONS FOR GRANTING THE WRIT

1. From the beginning, Judge Seybolt exhibited clear bias against Bono and his aunt in favor of Parkinson's scheme to retain control over Laura's fortune, but Seybolt refused to recuse himself. Faced with Parkinson's successful manipulation of the New Jersey court system, as a last resort, Bono sought justice by filing the Federal Action, which made allegations directly related to the subject matter and procedures in the New Jersey case. Judge Seybolt took sides in the Federal Action as an adversary to Bono while continuing to preside over a case where Bono was a defendant. His decision, in response to the Federal Action, to align himself with Bono's opponents completely stripped Judge Seybolt of the necessary impartiality. The Petition should be granted to address whether a litigant's due process rights are violated when a purportedly impartial judicial officer joins forces with parties opposing a litigant in the case before the judge, and the judge continues to preside over that case and deprives the litigant of a property right.

2. The New Jersey court system was manipulated by Parkinson to Bono's detriment. Judge Seybolt repeatedly bent or disregarded the rules, allowing Parkinson to file false pleadings, file motions without adequate notice and ultimately precluding Bono from appearing to defend himself. Judge Seybolt then punished Bono with a damages award even though the pleadings did not give any notice that damages could be awarded. Parties have a due process right in the rules and procedures set up by a state to resolve disputes. The Petition should be granted to consider whether failure to follow the rules resulting from Parkinson's manipulation of the system deprived Bono of his due process rights and whether the cumulative of

effect of these repeated rule violations collectively led to a violation of Bono's due process rights.

POINT I THE PETITION SHOULD BE GRANTED TO ADDRESS WHETHER A LITIGANT'S DUE PROCESS RIGHT TO A HEARING BEFORE AN IMPARTIAL TRIBUNAL IS VIOLATED WHEN A JUDGE EXHIBITS CLEAR BIAS AGAINST A LITIGANT AND JOINS FORCES WITH PARTIES THAT ARE OPPOSING THE LITIGANT IN THE CASE BEFORE THE JUDGE.

The Petition presents an important issue of constitutional law – can a judge who blatantly and expressly joins against one of the litigants appearing before the judge maintain constitutionally-required impartiality. This Court has previously held that a litigant has a right under the Due Process Clause to have disputes adjudicated by an impartial tribunal. From the beginning of the New Jersey case, Judge Seybolt took sides against Bono and expressly did so by joining in pleadings filed by Bono's opponents in the Federal Action. While litigant may not generally force a judge to recuse himself by suing him separately, a judge who actively participates along with other defendants who oppose a litigant appearing before him can no longer be considered impartial. The New Jersey appellate court concluded that Seybolt had complete discretion regarding whether he should be recused. The Petition should be granted to address whether, under these circumstances, Seybolt's decision to continue presiding over the case violated Bono's due process rights.

A. This Court Has Established That a Litigant has a Right Under the Due Process Clause to Have Disputes Adjudicated by an Impartial Officer.

Judge Seybolt's refusal to recuse himself violated Bono's Fourteenth Amendment due process rights.[4] "[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982). In *Offutt v. United States*, 349 U.S. 11 (1954), where this Court determined that a judge who became personally embroiled with counsel during trial should ask another judge to conduct a hearing charging that same counsel with contempt, this Court stressed that "justice must satisfy the appearance of justice." *Id.*, 349 U.S. at 14. This principal applies to civil cases as well as criminal matters. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The requirement of impartiality "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Id.* Judge Seybolt's conduct violated Bono's due process rights because, after he had been sued by Bono and actively participated in the Federal Action in concert with parties opposing Bono, he abandoned both the appearance and the reality of impartiality.

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[4]Both New Jersey and the federal court system have nearly identical provisions establishing when a judge should be recused on the grounds that the judge is not impartial. *See* 28 U.S.C. § 455(a); Cannon 3(C), N.J. Code of Judicial Conduct.

B. From the Inception of the Case, Judge Seybolt Took an Adversary Position to Bono, Which Became Open and Notorious When Seybolt Joined Forces With the Other Defendants in the Federal Action Against Bono.

In the beginning of the case, Judge Seybolt turned a blind eye to Parkinson's duplicity in filing his verified complaint where Parkinson alleged that Laura was suffering from an organic brain syndrome and is demented but at the same time asked Seybolt to approve contracts and documents Parkinson entered into with Laura after the date Parkinson alleged that Laura became incompetent. (Bda 40, B10T:63-23 to 66-20.) Indeed, Seybolt approved those contracts while, at the same time, accepting Parkinson's allegation that Laura was not competent to manager her own affairs. Seybolt then ignored eighteen sworn affidavits and other sworn testimony establishing that the guardian's report was false. (Bda386-393.) Seybolt refused to disregard the report and instead, relied on it as a basis for removing Bono as Laura's chosen trustee and advisor without holding a hearing. (Bda71, Bda244.) Judge Seybolt also relied on the false guardian's report to find that a *prima facie* case of undue influence had been made. (Bda70-72.) Bono's request that Seybolt recuse himself on the basis of his obvious bias was rejected without a hearing. (B4T:10-15 to 13-17; B4T:16-18 to 19-7.) Seybolt then proceeded to strike Bono's pleadings, preclude Bono from any further appearances in the case, permanently remove Bono as trustee, and enter a million dollar judgment against Bono.

C. Judges Who Choose to Actively Align Themselves With Parties Opposing a Litigant Abandon Impartiality, Thereby Denying Litigants of Their Due Process Rights.

The Petition should be granted to consider whether, by choosing to actively participate in the Federal Action and align himself with parties who were opposing Bono in the state court matter over which he was presiding, Judge Seybolt became so personally involved in litigating against Bono that when he refused to recuse himself in the state court case, Bono's due process rights were violated. Bono is not arguing that his due process rights were violated because Judge Seybolt was required to recuse himself when Bono sued him. This argument has been uniformly rejected by the federal courts, and Bono does not challenge that principal. *See United States v. Pryor*, 960 F.2d 1, 3 (1st Cir. 1992) ("it cannot be that an automatic recusal can be obtained by the simple act of suing the judge"); *United States v. Studley*, 783 F.2d 934, 940 (9th Cir. 1986) ("A judge is not disqualified by a litigant's suit or threatened suit against him"); *United States v. Grismore*, 564 F.2d 929, 933 (10th Cir. 1977) (same). And Bono is not merely complaining about a few adverse rulings. Instead, Bono asks the Court to consider whether due process protections are abridged when a judge chooses to become actively and personally involved in opposing a party who is also appearing before the judge.

The record makes it plain that Judge Seybolt did not merely rule against Bono on contested issues – Seybolt, from the beginning, aligned himself with Parkinson to protect Parkinson's interests at the expense of Bono and in complete disregard of the applicable rules. Seybolt openly sided with Parkinson in the Federal Action by actively participating in the defense of the action along with Parkinson and defending his

own actions in the state court proceeding, which were the subject of Bono's complaint in the Federal Action. Bono asserts that under these circumstances, where a judge has actively aligned with those opposing a litigant appearing before the judge, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Other federal courts have recognized that when a judge like Seybolt becomes too personally involved in a case pending in his court, the judge must be recused. In *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 163 (3d Cir. 1993), the Third Circuit held that the requirements under the federal recusal statute are intended to prevent the trial judge from even "being perceived to assume, an adversarial position." *Alexander*, 10 F.3d at 165. The court found that the trial judge's conduct in submitting a letter response to a petition for writ of mandamus "could be misinterpreted by a reasonable person, to say nothing of a disappointed litigant, as an attempt by Judge Lechner to align himself with Primerica." *Id.* at 165. In this case, Judge Seybolt's decision to align with Parkinson and to actively adopt motions made by persons who were also opposed to Bono in the New Jersey case while continuing to preside over that case is not constitutionally tolerable.

In *Republic of Panama v. American Tobacco Co.*, 217 F.3d 343, 347 (5th Cir. 2000), the court held that the trial judge had to recuse himself because his name was on a brief filed by the Louisiana Trial Lawyers' Association in an unrelated case. *Republic of Panama*, 217 F.3d at 344-45. This ruling was made notwithstanding the fact that the Judge did not author the brief and it was submitted after he was no longer president of the organization. The Fifth Circuit decided that while there was no evidence of actual bias, under the circumstances, a reasonable

person might harbor doubts about the judge's impartiality. *Id.* at 347. Similarly, in *Bradshaw v. McCotter*, 785 F.2d 1327 (5th Cir. 1986), *rev'd on other grounds*, 796 F.2d 100 (5th Cir. 1986), the court held that a judge on the Texas Court of Criminal Appeals should have recused himself because at the time of the defendant's conviction, the judge's name was listed on a brief as state prosecuting attorney in the defendant's appeal. Even though the judge stated that he did not actually participate in the prosecution of the case, the court stated that the mere appearance of his name on the brief undermined the appearance of neutrality. *Bradshaw*, 785 F.2d at 1329. Here, Seybolt did not merely put his name on some papers – he actively participated in concert with other defendants who were also opposing Bono in the New Jersey case.

This Court has previously recognized that when a judge has a pecuniary interest in the outcome or a case or becomes too personally embroiled in a controversy with a litigant appearing before the bench, recusal is constitutionally mandated. The Court in *Withrow* identified those situations as ones where "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* Seybolt had an interest in making sure that Bono was unsuccessful in the New Jersey proceedings as a basis for arguing, *inter alia*, that Bono's claims in the Federal Action were merely the complaints of a dissatisfied litigant and that the federal court should not intervene in ongoing state proceedings.

Seybolt was also clearly the target of strident criticism by Bono in the Federal Action. In his pleadings in the Federal Action, Bono alleged that Judge Seybolt joined Parkinson and other private parties and government officials in a scheme to enable Parkinson and his associates to take over and control the affairs of wealthy elderly individuals like Laura and her brother.

Bono asserted that Judge Seybolt helped Parkinson and others manipulate the legal system to take away elderly persons' control of their own financial affairs on the basis of false allegations to enrich Parkinson and his associates. In such a situation, this Court has previously acknowledged that a litigant's due process rights are violated when a judge becomes the target of such criticism from a litigant and then presides over a proceeding where the litigant may be punished for making such criticisms.

In *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), the Court held that a defendant who insulted the trial judge and attacked his character was entitled, under the due process clause, to a public trial on subsequent criminal contempt charges before a judge other than the one he had insulted and attacked. *Mayberry*, 400 U.S. at 466. In this case, Bono complained in the Federal Action about Judge Seybolt's conduct. While continuing to preside over the New Jersey proceeding, Judge Seybolt had an opportunity to punish Bono for his criticisms in the Federal Action. The Petition should be granted to consider whether, under these circumstances, the Due Process Clause required that Judge Seybolt be recused so that he could not preside over a proceeding where Bono could be punished for making claims in the Federal Action.

D. By Continuing to Preside Over the Case, Judge Seybolt Deprived Bono of his Due Process Right to Litigate Before a Fair and Impartial Tribunal.

A reasonably objective observer, looking at Judge Seybolt's partisanship on behalf of Parkinson and his efforts to cover up that favoritism, would conclude that by taking an active role as an adversary to Bono, one of the litigants before him, Judge Seybolt abandoned his impartiality. After receiving Bono's First Amended Complaint in the Federal Action that, *inter alia*, challenged Seybolt's improper, *ex parte* appointment of a guardian ad litem and other actions taken in favor of Parkinson, Seybolt depreciated Bono's Federal Action pleading on the record during the state proceeding. In an attempt to defend the appointment of Parkinson's chosen guardian, Seybolt began claiming that Parkinson filed his false verified complaint on January 20, 1998, instead of January 22, 1998, as he had previously stated and despite a myriad of other documents in the record, including his own orders, belying that assertion. The filing date is critical because it determines whether, as Bono alleged, the guardian was improperly appointed *ex parte*. Seybolt's stated impressions of Laura's competence when she replaced Parkinson with Bono as her financial advisor changed markedly after Seybolt received the Amended Complaint. Instead of being a woman with a surprising sense of humor and alertness, Seybolt now called her a woman who was in a weakened condition with very little input in her affairs. After receiving the Amended Complaint in the Federal Action, Judge Seybolt entered a default against Bono, struck his pleadings without the required notice being given, prohibited Bono from any further participation in the proceedings, removed him permanently as trustee, and entered a million dollar judgment against him even though none of the pleadings gave notice that damages were being requested.

Faced with this record, the New Jersey appellate courts failed to intervene and simply concluded that Seybolt himself had apparently unlimited discretion to decide whether he should recuse himself or continue to preside and make certain that Parkinson's scheme was successful and that Bono was punished, both for standing in Parkinson's way and for attacking Seybolt in the Federal Action. The New Jersey proceeding presided over by Seybolt made a mockery of the Due Process Clause's guarantee of a hearing before an impartial arbiter. The Petition should be granted to address whether, under these circumstances, Bono was deprived of his due process rights because Seybolt, who had become his adversary, continued to preside over the state court matter.

POINT II THE PETITION SHOULD BE GRANTED TO ADDRESS WHETHER A LITIGANT'S DUE PROCESS RIGHTS ARE VIOLATED WHEN STATE PROCEDURES AND RULES DESIGNED TO AFFORD LITIGANTS A FAIR OPPORTUNITY TO PRESENT AND DEFEND CLAIMS ARE REPEATEDLY NOT FOLLOWED BY STATE COURTS RESULTING IN THE LOSS OF A LITIGANT'S OPPORTUNITY TO DEFEND HIS OR HER INTERESTS.

The Petition should also be granted to consider whether the Due Process Clause may be invoked as a check on state judicial officers who repeatedly ignore the procedures and rules set up by the state, leading to results that prejudiced Bono and cannot be explained under those procedures and rules. New Jersey has established court rules and procedures that are supposed to govern how litigation proceeds in the courts. On numerous occasions in this case, Judge Seybolt, at Parkinson's behest, completely disregarded those rules and procedures to Bono's detriment. Indeed, in complete disregard for the rules and principles of fairness, Seybolt went out of his way to compliment Parkinson's actions, including the false verified pleading he filed, and compliment the report made by Selvaggi, Parkinson's chosen guardian, even though that report was shown in open court to be false and misleading.

This Court has previously made it clear that parties have a due process right in the rules and procedures set up by a state to resolve disputes. *See Logan v. Zimmerman Brush Co.* 455 U.S. 422 (1982) (party has property interest to be protected by due process in right to use procedures set up by government to adjudicated disputes). The rule violations and multiple improprieties in this case resulted in Bono being barred from representing his interests in the case without proper notice and

being subjected to a million dollar damages award without notice. The Petition should be granted to consider whether Judge Seybolt's repeated rules violations deprived Bono of his due process rights. The Court should also consider if, when the cumulative of effect of such serial rule violations indicate that a court system, instead of being administered according to the rules to fairly adjudicate disputes, is being manipulated to benefit certain people favored by the system, outsiders like Bono are denied due process because they are afforded no opportunity for a fair hearing.

A. Judge Seybolt Violated Bono's Due Process Rights by Entering a Damages Award Against Him Without Proper Notice.

Judge Seybolt violated the applicable New Jersey court rules and entered a judgment against Bono even though he had no notice in the petitions on file that any opposing party was seeking an award of damages. In their pleadings in the state court case, the Laura J. Niles Foundation (controlled by Parkinson) only sought relief against Serena Niles, and Parkinson's complaint sought no money damages at all. (Bda4; Bda152-156.) Even though none of the parties opposing Bono requested in their pleadings that a damages award be entered against him, Judge Seybolt imposed over one million dollars in damages against Bono in direct violation of the New Jersey rules. New Jersey Court Rule 4:43 states that the final judgment shall not be different in kind nor exceed the amount demanded in the pleading . . .." N.J. Ct. R. 4:43-2. In *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), this Court made it plain that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that" may be

imposed on a defendant. *BMW*, 517 U.S. at 574. Judge Seybolt refused to let Bono respond to any claims made against him and rejected papers filed by Bono in response to the application for fees. In addition, although Parkinson was no longer a fiduciary to Laura or the three Trusts and therefore had no standing, Seybolt allowed him to submit objections in his own name to the accounting and supplemental accounting by Bono as a basis for imposing damages. (Bda94.) Here, because Judge Seybolt ignored the applicable New Jersey rule designed to protect the rights of litigants like Bono, Bono had no notice from the pleadings on file prior to the notation of default that he could or would be subjected to any imposition of damages, in violation of his due process rights.

B. Judge Seybolt's Entry of a Default Against Bono Violated His Due Process Rights.

Judge Seybolt also violated New Jersey rules and statutes and deprived Bono of his due process rights by entering a default and striking his pleadings without the required notice. The New Jersey rules require that a non-movant must be given sixteen days notice of any motion unless the court enters a separate order shortening the time period. N.J. Ct. R. 1:6-3. Under the rules, the motion to strike Bono's pleadings should have been served at least sixteen days in advance, not the night before via facsimile machine. Under this Court's precedents, Judge Seybolt's entry of a default against Bono without proper notice violated Bono's due process rights. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988). By completely ignoring the applicable rules and effectively entering a default against him on almost no notice, Judge Seybolt violated Bono's due process rights.

C. Judge Seybolt's Orders Striking Bono's Pleadings and Barring Him From Appearing at a Proofs Hearing Deprived Bono of His Due Process Rights.

Judge Seybolt also ignored the rules and barred Bono from participating in the hearing where evidence was presented in support of a damages award against him. Under New Jersey law, "while a judgment by default ordinarily precludes a defendant from offering testimony in defense, it does not necessarily obviate the obligation of plaintiff to furnish proof on the issue of damages as well as liability." In *Johnson v. Johnson*, 224 A.2d 23, 27 (N.J. App. 1966). Even where a party is held in default, the court should at least permit cross-examination during a proofs hearing, *unless* the court justifies departure from this general rule. *Jugan v. Pollen*, 601 A.2d 235, 240 (N.J. App. 1992); *accord DiGiacomo v. DiGiacomo*, 607 A.2d 186, 188 (N.J. App. 1992). Seybolt nevertheless precluded Bono from cross-examining opposing parties on the offer of damages, after the entry of a notation of default against him. (B9T: 15-22 to 16-12). The court's actions in precluding Bono's counsel from participating or challenging the proof offered against him also resulted in a violation of his due process rights.

Judge Seybolt's orders striking Bono's pleadings as a discovery sanction also raise due process concerns. A court's action in imposing sanctions, such as striking pleadings, must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law. This Court's decisions in *Hovey v. Elliott*, 167 U.S. 409 (1897) and *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322 (1909) recognize that there are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party

the opportunity for a hearing on the merits of his cause. *See Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958). Indeed, this Court has stated that the Due Process Clause prevents states from denying potential litigants the use of established adjudicatory proceedings when such an action effectively denies the litigants any opportunity to be heard regarding their claims and rights. *See Boddie v. Connecticut*, 401 U.S. 371, 380 (1971). The Petition should be granted to address whether Judge Seybolt's actions in striking Bono's pleadings and preventing him from defending his interests violated Bono's due process rights.

CONCLUSION

Bono was deprived of fundamental protections of due process and his substantive rights at every stage of the proceedings in state court. Judge Seybolt removed Bono as Laura's trustee on the basis of the GAL's false report. The improperly-appointed GAL did not advocate for Laura's rights but instead assisted Parkinson by waiving Laura's attorney-client privilege. Judge Seybolt, having been manipulated by Parkinson and seeing a chance to punish Bono for seeking justice in the Federal Action, made a finding of undue influence where there was none and entered a judgment of over one million dollars against Bono after prohibiting him from appearing to defend himself. Judge Seybolt also vacated Laura's will, even though a will cannot be contested while the putative testator is still alive. The record is replete with evidence that Parkinson subverted and manipulated the statute judiciary in New Jersey.

The New Jersey proceedings described herein may only be seen as a travesty of justice. And this travesty did not only affect Bono and his interests. Parkinson successfully

manipulated the system to deprive Laura of the ability to control her own affairs, preventing her from giving large bequests to her preferred charities and substituting his own greedy scheme for Laura's will. Parkinson will be able to deprive other people like Laura of their rights in the future if the ongoing manipulation remains unchecked. Because the issues presented in this Petition are important questions of law involving this Court's Due Process jurisprudence, the Petition for a Writ of Certiorari should therefore be granted.

Dated: January 3, 2003

Respectfully submitted,

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By: Jonathan C. Scott
Jonathan C. Scott
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Supreme Court Bar

SUPREME COURT OF NEW JERSEY
C-37 September Term 2002

ON PETITION FOR
CERTIFICATION

IN THE MATTER OF THE TRUST
CREATED MARCH 31, 1992 BETWEEN
LAURA J. NILES, GRANTOR, and
GEOFFREY M. PARKINSON, TRUSTEE;

TRUST CREATED MARCH 31, 1992,
BETWEEN LAURA J. NILES, GRANTOR,
and GEOFFREY M. PARKINSON,
TRUSTEE; and

TRUST CREATED AUGUST 23, 1994,
BETWEEN LAURA J. NILES, GRANTOR,
and GEOFFREY M. PARKINSON,
TRUSTEE.

(SERENA NILES - Petitioner)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4644-99 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice at Trenton, this 5th day of September, 2002.

CLERK OF THE
SUPREME COURT
OF NEW JERSEY

CLERK OF THE
SUPREME COURT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4644-99T1
A-4649-99T1

IN THE MATTER OF THE TRUST
CREATED MARCH 31, 1992 BETWEEN
LAURA J. NILES, GRANTOR, and
GEOFFREY M. PARKINSON, TRUSTEE;
TRUST CREATED MARCH 31, 1992,
BETWEEN LAURA J. NILES, GRANTOR,
and GEOFFREY M. PARKINSON,
TRUSTEE; and

TRUST CREATED AUGUST 23, 1994,
BETWEEN LAURA J. NILES, GRANTOR,
and GEOFFREY M. PARKINSON,
TRUSTEE.

Argued: December 19, 2001 - Decided: March 14, 2002

Before Judges Baime, Fall and Axelrad.

On appeal from the Superior Court of New Jersey,
Chancery Division, Probate Part, Warren County,
Docket No. P.98-0435.

Joseph P. Castiglia argued the case for the appellant/
cross-respondent Serena Niles in A-4644-99T1

Jonathan C. Scott of the New York Bar, admitted pro

hac vice, argued the cause for appellant/cross-respondent Salvatore A. Bono, in A-4649-99T1
(Milazzo Fortunato McCann & Murray, attorneys;
William J. Murray, on the brief).

John A. Ridley argued the cause for the respondent/cross-appellant Geoffrey M. Parkinson (Gibbons, Del Deo, Dolan, Griffinger & Vecchione, attorneys;
Mr. Ridley and David Fernandez, of counsel; Michael G. Langan and Mara Zazzali, on the brief).

Bruce L. Shapiro argued the cause for respondent/
cross-appellant The Laura J. Niles Foundation, Inc.
(Drinker Biddle & Shanley, attorneys; Edward J.
Gramigna and Mr. Shapiro, of counsel; Mr. Shapiro,
on the brief).

PER CURIAM

In these consolidated appeals, we consider the challenges of appellants, Serena Niles (Serena) and her son, Salvatore A. Bono (Salvatore), to the findings and conclusions of the trial court after a bench trial as memorialized in an amended final judgment entered on March 24, 2000.

The trial court found that Salvatore committed numerous acts of malfeasance, negligence and self-dealing as trustee under trusts created by Laura J. Niles (Laura). The court

permanently removed Salvatore as trustee and fiduciary to Laura; removed Salvatore as a director of the Niles Foundation, Inc. (Niles Foundation);[5]

and imposed surcharges against Salvatore.

The trial court also found that Salvatore and Serena exerted undue influence upon Laura, improperly causing Laura to execute documents that, inter alia, transferred control over her assets and affairs to Salvatore; and that Salvatore and Serena, working in concert, abused the trust and confidence Laura placed in them by, "among other things, attempting further changes to her will, using Laura's credit cards, checks, and cash for personal expenditures, obtaining improper and unauthorized compensation for Salvatore Bono, and using the funds in the trusts for wholly improper purchases[.]"

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[5] The Laura J. Niles Foundation, Inc., a non-profit corporation, was formed on or about March 31, 1992, is the respondent-appellant herein and shall be referred to as "Foundation." The Niles Foundation, Inc. was formed on or about August 15, 1997, is a New York non-profit corporation, and is referred to herein as "Niles Foundation."

As a result of these findings, the March 24, 2000 amended judgment, in pertinent part:

> (1) Entered judgment against Salvatore and Serena in favor of plaintiffs Geoffrey M. Parkinson (Parkinson) and the Foundation on all allegations of undue influence contained in their complaints;
>
> (2) Declared as null and void:
>
> > (a) the "Modification of Restatement of Trust Agreement" dated May 21, 1997,
> >
> > (b) the "Dismissal and Replacement of Trustee," dated May 21, 1997, for the Laura J. Niles Charitable Remainder Unitrust (CRUT I) and the Laura J. Niles Charitable Remainder Unitrust II (CRUT II),
> >
> > (c) the "Second Modification and Restatement of Trust Agreement" dated August 15, 1997; and
> >
> > (d) all other wills, codicils, trust agreements, trust amendments, documents affecting powers of attorney, and other testamentary or trust documents signed by Laura on or after January 1, 1997;
>
> (3) Declared that the personal assets of Laura and the assets held in the trusts established by Laura shall be governed by the provisions of the trust documents, wills, codicils, and

other testamentary documents in effect as of January 1, 1997;

(4) Reinstated Parkison as the executor, trustee, and attorney-in-fact for Laura;

(5) Assessed a surcharge against Salvatore in the amount of $805,727;

(6) Assessed a surcharge against Serena in the amount of $162,014;

(7) Ordered that Salvatore and Serena be jointly and severally liable to the Laura J. Niles revocable Trust created March 31, 1992, for counsel fees in the amount of $314,282; and

H. Ordered that Salvatore and Serena be jointly and severally liable to the Foundation in the amount of $50,000 for compensatory damages.

The Foundation and Geoffrey M. Parkinson (Parkinson) cross-appeal, contending the surcharges and damages imposed in the March 24, 2000 amended judgment are inadequate.

Two of three trusts at isue were created by documents executed by Laura on March 31, 1992, which revised here prior will and established: (1) a revocable trust into which Laura

placed most of her assets, the residuary beneficiary of which was the Foundation; and (2) a charitable remainder unitrust (CRUT I) into which Laura placed a small portion of her assets for income-production and tax-savings purposes. The third trust, a second charitable remainder unitrust (CRUT II), was created by Laura on August 23, 1994. Parkinson was the appointed trustee under these three trusts from their inception, until removed by the documents executed by Laura on May 21, 1997.

Laura was born on July 1, 1909, was never married and had no children. Henry E. Niles (Henry) was Laura's younger brother; he died on December 27, 1997, a resident of New York. On November 13, 1992, Joseph J. Kunzeman, Esq. (Kunzeman), was appointed conservator of the property of Henry by order of the New York Supreme Court. Parkinson and Leland C. Selby, Esq. (Selby) are the proposed executors of

Henry's estate under his will, probated in the Suffolk County, New York, Surrogate's Court.

Laura and Henry inherited a sizable fortune from their father's estate, which included thousands of shares of General Electric stock. Neither Laura nor Henry ever held a job and, until 1986, they lived together in their jointly-owned family home in Brightwaters, Long Island, New York.

In 1986, Laura purchased a home in Blairstown, New Jersey, situated on a twenty-five acre parcel on which she pursued her hobby of breeding show-quality poodles, and she maintained horses.

Parkinson was a long-term neighbor and friend of Henry and Laura in New York. Parkinson was retained as Henry's financial manager and gave Laura financial advice for many years, becoming her portfolio manager in the 1990's when he worked for Shearson Lehman Brothers. Parkinson subsequently

formed his own financial consulting firm, Greenwich Advisory Associates.

When Laura left the Brightwaters home in 1986, Henry was in declining physical and mental health. A friend of Laura's asked Serena if she would occasionally check on the well-being of Henry. Serena was approximately thirty years younger than Henry. Between 1986 and 1989, Serena and Henry formed a relationship and would regularly dine together at a restaurant of which Serena was a part owner.

By 1990, Henry was incapable of handling his personal and financial affairs. In that year, Henry sustained a million-dollar loss at the hands of an unscrupulous stockbroker. As a result, Parkinson and Selby, Henry's New York attorney, suggested that Henry institute voluntary conservatorship proceedings to ensure that his property and money would be appropriately managed. Laura agreed that the appointment of a conservator would be in Henry's best interest.

After the conservatorship proceedings were instituted in New York, Parkinson and Selby learned that Serena and Henry were contemplating marriage. On April 19, 1991, Selby obtained an order from the New York court prohibiting the marriage between Henry and Serena; thereafter, Henry refused to participate voluntarily in the conservatorship proceedings. Serena obtained new counsel for Henry to defend against conservatorship proceedings, but was unsuccessful.

Kunzeman was appointed as Henry's conservator, and Parkinson remained as Henry's financial advisor. Notwithstanding entry of the restraining order, Henry and Serena married on November 4, 1992.

Kunzeman initiated annulment proceedings in New York, which were withdrawn when Serena entered into a post-nuptial agreement that would provide her $250,000 per year for every year she remained married to Henry and a $1 million bonus if she remained married to Henry for a period of five years. As

previously noted, Henry died on December 27, 1997. Henry had no children.

Laura's 1988 will was drawn by James Lamb, a New Jersey attorney who represented Laura when she purchased the Blairstown home. That will made a number of specific bequests to charities and made Henry and Laura's goddaughter, Carol Boehn, income beneficiary for life of a trust containing the residue of Laura's estate which, upon the death of the surviving life tenant, was to be divided equally among four individuals: Kara and Eric Leib, Elizabeth Langham and Michelle Lennen.

Following Lamb's advice, Laura executed a new will and trust documents that revised her estate plan. The new will, executed on March 31, 1992, directed her entire estate, except her dogs, into two trusts, both also executed on March 31, 1992. One trust was the CRUT I, into which Laura placed over $9.5 million of her assets, largely consisting of stocks; six-percent of

the value of those assets was to be paid to Laura annually, and on her death, the principal and income were to go to the Foundation. The second revocable trust created on March 31, 1992 paid Laura all of the net income of the trust estate and, at Laura's death, provided specific bequests for the named beneficiaries, with the Foundation named the residuary beneficiary. Parkinson was named trustee of both the CRUT I and the second revocable trust document, and Lamb was named as successor trustee of both trusts. Parkinson and Lamb, successively, were given medical power of attorney by Laura at the same time.

The trust agreements were subsequently modified. The first modification was executed on May 26, 1994, to provide for bequests to Gregory Drejka and Romana Baranska, Laura's housekeepers.

On August 23, 1994, Laura executed a document creating a second charitable unitrust (CRUT II), which was designed to yield her a higher income from the assets

it contained. Parkinson and Lamb were appointed successor trustees of the CRUT II. The terms of the CRUT II were identical to the CRUT I, except that Laura would annually receive nine-percent of the net fair market value of the assets in the CRUT II. On that same date, Laura made a second trust modification eliminating Patricia Proctor as a named beneficiary and amending a provision for beneficiaries, Patricia Lennen and her son Kim.

In 1995, the trusts were modified in September and December, the first increasing the provision for Drejka and Baranska, and the second re-affirming Proctor's removal as a beneficiary.

By January 1994, Laura had been diagnosed with a number medical problems. Her physician, Dr. Craig Buggeln, who had

treated Laura since August 1993, described her as "a pleasantly demented 84-year-old with multiple medical problems," that included organic brain syndrome, cerebrovascular disease, hypertension, hyperchloresterolmia, cholelithiasis, chronic anemia, seizure disorder, peptic ulcer disease, and hemorrhoids. Buggeln asserted that "each of these problems is medically stable" as long as Laura took a series of medications, and followed a low sodium, low saturated fat meal plan at home. However, Dr. Buggeln observed that because of her organic brain syndrome, she could not be relied upon to take her medications properly or to follow through with the dietary restrictions. Consequently, he recommended that Laura be provided twenty-four hour nursing care either at home or in a chronic care nursing/retirement facility.

By October 1994, Parkison was given the responsibility for handling Laura's checkbook and for paying her monthly expenses. Parkinson never signed the checks. Rather, the

monthly bills were collected by Drejka and given to Parkinson, who would prepare the checks, return them to Drejka, who would then have Laura sign them.

Laura changed doctors in April 1995 and began seeing Dr. Leslie Schlessinger, who found "alert, oriented and seemed to be mentally competent" when he first saw her.

When Serena first started seeing Henry in 1986, Laura did not like her. Indeed, Laura filed a waiver and consent to the appointment of co-conservators for Henry at a time when Parkinson and Selby were seeking both a conservatorship and the injunctive relief against the contemplated marriage of Henry and Serena. Michael Selvaggi, the court-appointed guaradian ad litem for Laura, reported that Laura characterized Serena as "a con-artist" who was only marrying Henry for his money.

Nevertheless, Laura began spending more time with Serena and Henry after their marriage in 1992, celebrating holidays with them at Brightwaters, and spending time at Blairstown

when Henry and Serena would visit. Serena began pressuring Laura purchase a condominium in Naples, Florida for use by Serena, Henry, Laura and other family members. Laura refused Serena's initial request. However, by November 1995, Serena had convinced Laura that the purchase would be in Henry's best interest, despite the advice of Lamb and Parkinson that the decision was not wise. Parkinson authorized the condominium purchase for approximately $695,000, but, for tax purposes, arranged for the purchase to be made by the revocable trust and required Henry and Serena to pay a monthly rent of $7,500.00

On September 12, 1995, Laura and Kunzeman, as conservator of Henry, executed a deed conveying the Brightwaters property into the joint names of Henry and Serena.

Thereafter, Laura began to spend more and the more time with Serena, and then Salvatore, in Florida, New Jersey and New York. According to Serena and Salvatore, Laura became unsatisfied with Parkinson and his management of her affairs.

Laura's nurses reported that in 1997 Laura began speaking ill of Parkinson, claiming she could no longer trust him and that Parkison was charging too much for his services.

According to Salvatore, Laura asked him to recommend an attorney. Salvatore directed Laura to his friend, Gerald Schrager, an attorney with the New York Law firm of Fischbein Badillo, and to Gregory O'Connell, of the New York law firm DeFeis, O'Connell & Rose, with whom Salvatore had an attorney-client relationship.

In mid-April 1997, Laura contacted Schrager and asked him to review her estate documents. Shortly thereafter Laura met with Salvatore, Schrager and his law Partner Lawrence Gilberti, and Drejka, as which time they discussed Laura's estate plan. Laura told Schrager and Gilberti that she wanted to amend her estate plan and appoint Salvatore as her new trustee. Salvatore was present and participated in the meeting.

There was a second meeting between Laura, Gilberti and Schrager, where they discussed the individuals to whom Laura wanted to leave bequests; specifically money to Salvatore's children and the Florida condominium to Serena. Gilberti asked Laura to write down how much money each of Salvatore's children would receive and the types of charities her foundation would support.

On or about May 13, 1997, Salvatore brought written instructions to Gilberti, marked with Laura's initials next to each bequest and, at the end, in a third party's handwriting, was the notation "$1 million to Salvatore Bono to take as I wish." The signature next to the language purported to be that of Laura. Gilberti told Salvatore that was a bad idea, and Gilberti prepared a draft of Laura's will that did not contain the million-dollar bequest to Salvatore; however, the will contained bequests to each of Salvatore's four children.

The new will and trust documents were signed at Laura's home in Blairstown on May 21, 1997, in the presence of Gilberti, Schrager, Schrager's secretary Bridget Hitzler, another attorney, and a videographer who videotaped the proceedings. At that time, Dr. Schlessinger was asked to examine Laura. Although Laura had difficulty doing some of the tasks Dr. Schlessinger asked - Laura thought the year was 2000, not 1997, and was confused as to the day and date - Dr. Schlessinger felt that she knew where she was, why she was there, and what she wanted to do.

The May 21, 1997 will made Salvatore the executor of Laura's estate and placed the residue of her estate into her trusts. The May 21, 1997 modification to the March 31, 1992 trust agreement provided for the Florida condominium to be conveyed and distributed to Serena upon Laura's death. The trusts were modified to remove Parkinson and Lamb as trustees

and replace them with Salvatore. A superceding medical power of attorney was given by Laura to Salvatore.

On July 16, 1997, Laura was hospitalized, suffering from dehydration due to vomiting and diarrhea. She was discharged one week later to the Brightwaters home to live with Henry and Serena. A few weeks later, Laura returned to Blairstown. However, while still at the Brightwaters home, Laura executed a "services compensation agreement" with Salvatore on July 25, 1997, under which Laura agreed to pay Salvatore on $100,000 per year for his services as trustee of the revocable trust, as well as providing Salvatore compensation for

> management and administrative services with respect to Ms. Niles' personal assets which are not included within the corpus of the Revocable Trust, including record keeping and oversight with regard to her personal checking accounts, regular reporting to her as to an inventory and valuation of her assets, oversight and coordination of her personal tax, legal and accounting affairs, and the rendering to Ms. Niles periodic reports on cash flows and projections of her cash needs.

The compensation was to be paid bi-annually on May 21 and November 30 of each calendar year, the initial fee payment of which was to be paid on the execution of that July 25, 1997 agreement.

Parkinson, Lamb and Selby refused to resign as directors of the Foundation. Laura then further modified her trust agreements on August 15, 1997, replacing the Foundation with a new one, called the "Niles Foundation, Inc." Those documents made clear that Salvatore's compensation was to be pursuant to their separate compensation agreement.

Three weeks later, on September 9, 1997, at age eighty-seven, Laura suffered what Dr. Schlesinger variously described as a "rather massive," or "moderately severe" stroke. The stroke left Laura "quite debilitated." She was paralyzed on her left side; unable to swallow; required a feeding tube for

nutritional purposes; her speech was impaired; and she suffered from congestive heart failure.

On September 17, 1997, Laura was transferred to the rehabilitation institute at Morristown Memorial Hospital where she remained for four weeks before being discharged to the Brightwaters home on October 23, 1997.

Prior to her stroke, Laura told Salvatore she wanted to replace her station wagon vehicle with another station wagon. Laura looked at several vehicles and then, a few days before her stroke, went with Drejka to a Mercedes dealership and placed a $1,000 deposit on a Mercedes station wagon vehicle that cost $56,000. However, on October 16, 1997, Salvatore wrote a check on Laura's account to Sovereign Motor Cars for $74,022 in connection with the purchase of an S420 Mercedes Sedan for a total cost of $75,115.50. Prior to Laura's stroke on September 9, 1997, Salvatore had spoken with Schrager about the purchase

of a Mercedes Benz vehicle; Schrager advised against it, but Salvatore claimed it was something that Laura wanted.

On September 18, 1997, Salvatore advised Gilberti that Laura wanted Salvatore to have a $50,000 raise in his compensation as trustee. On September 19, 1997, Gilberti drafted an amended compensation agreement and wrote to Salvatore that he first wanted to confirm that this was Laura's intent. Although Salvatore became irate at this position, Gilberti and Schrager maintained they would not attend to execution of the modification to the agreement until they confirmed its accuracy with Laura; that never occurred. However, Salvatore independently obtained Laura's signature on the amended compensation agreement. As of July 1998, Salvatore had paid himself $200,000 in compensation as Laura's trustee, which was $50,000 in excess of even what the amended compensation called for.

Two days before Henry died, Salvatore's secretary drew a check on Laura's account in the amount of $20,460 for the purchase of a Cartier watch, purportedly a Christmas gift from Laura to Henry. Laura was not present when the watch was presented to Henry and Henry was so sick he was unable to open the package or respond in any way.

After Henry's death, Salvatore requested Gilberti to draw a new will for Laura that would remove the charities and leave the entirety of Laura's residuary estate to Serena. On January 16, 1998, Dr. Schlessinger saw Laura at Gilberti's request. Dr. Schlessinger administered a standard mental examination, which Laura failed. According to Dr. Schlessinger's testimony, Laura made seven significant errors and experienced great difficulty expressing herself. Dr. Schlessinger concluded Laura was not mentally competent and so informed Gilberti and Salvatore.

After Henry's death, the monthly living-expense payments from Henry's conservator ceased. Thereafter, Salvatore issued a series of checks from Laura's account to pay household expenses at the Brightwaters home. Additionally, between June 1997 and August 1998, over $47,000 was charged to Laura's credit cards, the majority of which Salvatore was unable to account for or explain. Salvatore acknowleged those purchases could have been made by Serena, since she had access to Laura's credit cards.

On January 20, 1998, Parkinson filed a three-count verified complaint and accounting in the Probate Part, seeking: (1) allowance of the settlement of this account; (2) allowance of investment advisory fees; and (3) appointment of a guardian ad litem for Laura. On January 22, 1998, the Warren County Surrogate issued and order to show cause with respect to the accounting and appointed Michael S. Selvaggi, Esq. as guardian ad litem for Laura, directing that Selvaggi issue a report

concerning the allegations of undue influence of Laura by Salvatore and Serena, as set forth in the third count of Parkinson's complaint.

By answer dated March 6, 1998, Salvatore objected to Parkinson's accounting and filed a counterclaim seeking dismissal of the complaint; denial of the request for investment advisory fees; the surcharge of Parkinson for improper disbursements from the trusts; and for excessive fees and attorneys' fees and costs.

On April 6, 1998, Judge Seybolt ruled Salvatore had no standing to challenge Parkinson's accounting.

On May 15, 1998, Selvaggi filed an eighty-eight page report with the court, containing summaries of his interviews with twenty-nine individuals and fifty exhibits. Selvaggi recommended that the Probate Part conduct a plenary hearing on the undue influence issue; that the court accept Parkinson's

accounting as submitted; and that Selvaggi be continued as Laura's guardian ad litem.

On June 23, 1998, the court entered an order that allowed the accounting as submitted; awarded the investment advisory fees as requested, as well as attorneys' fees and guardian ad litem fees; ordered a hearing on the issue of undue influence; required a formal accounting by Salvatore with respect to his services as trustee from May 21, 1997, to the present; and retained Selvaggi as Laura's guardian ad litem.

On July 31, 1998, Salvatore filed a complaint in settlement of his account and his accounting as trustee, which he amended on August 24, 1998. On August 27, 1998, Parkinson filed exceptions to Salvatore's accounting and sought removal of Salvatore as trustee and the surcharge of Salvatore for improper expenditures.

On September 18, 1998, the court heard argument on motions brought by Parkinson and the Foundation to have

Laura declared incompetent, to have a guardian appointed for her, and to have Salvatore removed as trustee. On September 24, 1998, the court entered an order that declared Laura an incapacitated person; appointed Selvaggi her guardian ad litem and temporary trustee; removed Salvatore as trustee pending final determination of the issues of the merits; and ordered Salvatore to make a supplemental accounting of all trust activities from May 31, 1998 to the present.

On December 18, 1998, Salvatore filed the supplemental accounting; Parkinson and the Foundation filed a series of exceptions to Salvatore's accounting.

On January 19, 1999, the Foundation filed a verified complaint in the Probate Part, seeking a determination that Serena and Salvatore exerted undue influence upon Laura to revise the trust agreements in their favor, to obtain unfettered use of Laura's credit cards, and to devise Laura's Florida

property to Serena. The complaint requested an order compelling appropriate reimbursement.

A consent order was entered on March 12, 1999, consolidating the Foundations's complaint with the complaint previously filed by Parkinson.

The court bifurcated the issues into two hearings. One hearing focused on Salvatore's accounting and whether he should be permanently removed as trustee, and the second hearing focused on the issue of undue influence. The first hearing commenced on April 21, 1999 and continued on May 3, May 4, 1999, July 12, 13, 14, 1999 and concluded on July 15, 1999.

On June 29, 1999, while the accounting and removal hearings were underway, Salvatore filed a pro se complaint in the Eastern District Federal Court of New York against numerous individuals involved in the New Jersey Probate Part trial, including Judge Seybolt, Parkinson, Selvaggi, and all

participating legal counsel. Salvatore's complaint charged the named defendants with fraud and racketeering, among other claims. On defendants' motion, the federal court dismissed Salvatore's action by order entered on September 20, 2000.

On July 12, 1999, counsel for Salvatore advised the court that Salvatore had decided to seek a stay of the proceedings before the court from the federal court and would not be present. Additionally, counsel for Salvatore moved for the recusal of Judge Seybolt based upon Salavtore's filing of the federal action. Salvatore's counsel also moved to be relieved. Judge Seybolt denied both applications starting, in pertinent part:

> The issue are still open. And in spite of efforts by [Salvatore] to try to get me into a position where I overstep myself or decide an issue before the issue is ready to be decided or overreact or react to what he has attempted to do both is his previous letter and in his suit in the Federal District Court, I recognize he has a right to seek relief in the Federal District Court.

I don't feel he has the right to derail this proceeding. And if I were to grant your motion at this point I would derail this proceeding and postpone it. . . . I think this matter has gone on long enough and I feel that we ought to get these issues resolved. We have a trial date in September, which I hope to follow on the undue influence issue. I hope we can get through this issue. We have set the entire week aside and a really tight schedule to get the issue of the accounting decided. I intend to move forward with it.

So as far as allowing you to withdraw at this point, I don't think you comply with Rule 1:11-2. I recognize that is puts you in a very difficult position. . . . However, I'm going to deny your application to withdraw at this point because we are ready to go today.

. . . .

I don't feel, and I don't feel that I am today biased against [Salvatore]. I have tried to up to now and I will continue to try to give him every opportunity to present his side of the case, but I am going to decided it and if somebody doesn't like it that's why we have an appeal procedure with respect to that. But I'm not going to put this off, we have set the entire week aside for this hearing to drop a box of papers off on me last Tuesday, with the idea to postpone this case, won't work, I will not yield to that particular tactic.

I will give [Salvatore] his fair day in court, if he chooses to waive his appearance, if he chooses to waive having counsel. If he wanted to have another counsel standing here representing him today he should have decided that before last week and made that move. He chose not to be here today. He chose to be someplace else. I am not interested in where, but we are proceeding. . . .

. . . .

But, I'm going to decide it based on what's submitted to me and despite the fact that he is trying his best to get this case removed from this courtroom, he is not successful at it and I don't expect somebody to walk in here five minutes to get a full grasp of the case and decided whether or not I am biased or unbiased. . . .

. . . .

I think . . . after my communication to you . . . in effect his not appearing today knowing that he is in the process of . . . direct examination and subject to cross-examination . . . he is in contempt of court. . . . I will have to refer the matter to the prosecutor and have the matter presented to another judge who will then decide whether his failure to appear today is in contempt of court. I am electing not to do that, but I do state on the record that I feel that that is showing some contempt of court. I am going to overlook that and in the interest of fairness

> proceed with the idea that he may have erred in judgment in deciding not to come here today[.] . . . I want to proceed in as fair a matter as I can as to [Salvatore], but also as to the other parties in this case.

An order memorializing the denial of Salvatore's recusal motion was executed on July 29, 1999. Salvatore failed to appear at any of the subsequent hearings; however, his counsel participated and called witnesses.

On August 3, 1999, Judge Seybolt issued a comprehensive written opinion with respect to Salvatore's accounting and removal as trustee. The judge found numerous instances of Salvatore's self-dealing as Laura's trustee, concluding they constituted a breach of his fiduciary duty to Laura. The judge permanently removed Salvatore as Laura's trustee and surcharged Salvatore $361, 800 for his misuse of trust funds, and assessed $1, 984.34 in costs. In reaching those conclusions, Judge Seybolt stated, in pertinent part:

> N.J.S.A. 3B:14-21 provides that the Court

may remove a fiduciary from office when. . . .

> c. he has embezzled, wasted or misapplied any part of the estate committed to his custody, or has abused the trust in confidence reposed to him.

[Salvatore], after spending the better part of two days on the witness stand at this plenary hearing and having failed to complete that testimony, took it upon himself to refuse to appear in Court for the continuation of the hearing and thereby obstructed the right of counsel for plaintiffs to complete his examination. That conduct is sufficient for the Court to declare a default on that part of [Salvatore] and remove him based upon his failure and refusal to appeal . . . . Nevertheless, in the interest of fairness due the fiduciary and in an effort to reach the merits of [Salvatore's] accountings, the Court will continue to review and comment on the merits of the case.

Throughout [Salvatore's] testimony . . . . he maintained that he was at all times, carrying out the instructions of Laura. The issue of undue influence has yet to be tried and a hearing on that issue is scheduled for September of 1999. In the hearing recently conducted by the Court, the Court will consider [Salvatore's] actions during his trusteeship from May 22, 1997 to May 31, 1998.

[Salvatore], ten days after Laura suffered a stroke on September 9, 1997, called Gilberti and told him that Laura wanted to give [Salvatore] a 50% raise from $100,000 to $150,000. Gilberti prepared the draft of the amended contract and sent it to [Salvatore] with a note indicating that Gilberti had to confirm the matter with Laura. [Salvatore] became furious and screamed at Gilberti's secretary and Gilberti and eventually hung up the phone on him. Schrager advised Gilberti that he had told [Salvatore] not to execute the contract until Fischbein Badillo conferred directly with Laura. [Salvatore] completely disregarded this instruction and arranged, with the help of Drejka and his mother, Serena, to obtain Laura's signature to the amended contract. The amendment was backdated to September 1, 1997 and included an overlapping period between the first and second compensation agreement from September 1, to November 30 which resulted in [Salvatore] receiving $200,00 for the year of his service. [Salvatore] devoted hundreds of thousands of dollars out of Laura's trust for purchases with Laura's credit cards, checkbooks and cash during a period of time when she was recovering from her stroke. These included purchases from Saks 5th Avenue, Nordstrom's, Bloomingdale's, Fortunoff, Gemelli, Fine Foods, Lord & Taylor, Brooks Brothers, Polo, Ralph Lauren, Sterns, etc. There is no dispute that Serena made most of these charges using Laura's credit cards,

without Laura being present and would sign Laura's name to the receipts. Although both Serena and [Salvatore] claim that these purchases were for necessities for Larua, [Salvatore], in his testimony, and Serena. in her deposition, failed to support this claim

From September 1, 1997 until May 31, 1998, $49,500 in cash was withdrawn from Laura's personal checking account during which time Laura's medical condition was significantly diminished. These checks were signed with Laura's signature stamp, one of which was kept in Blairstown with Drejka and the other at Brightwaters with Serena. . . . Both Serena and [Salvatore] admitted that they used cash for their own personal expenditures. [Salvatore] has given no explanation as to what was purchased much less why the Court should approve his use of Laura's cash. . . . [Salvatore] spent $12,046 out of Laura's personal checking account to pay for living expenses in Brightwaters. [Salvatore] claims that Laura paid these monies voluntarily, but it is hard to believe at the time of these expenditures that she knew or authorized them. . . .

[Salvatore] purchased a $20,000 Cartier watch with Laura's funds from a jewelry store with a note indicating it was for her brother. [Salvatore] claims that Laura picked out this watch on a shopping trip to Saks 5th Avenue accompanied by Serena and Drejka. The

testimony of Drejka disputed the claim of [Salvatore] and Serena. It was agreed that the watch was given to Henry on December 25, less than 48 hours before his death when it was apparent to everyone that Henry was dying. [Salvatore] paid out of Laura's trust monies, legal fees of $549, 726. This includes the payment of $314,282 to Fischbein Badillo in spite of the fact that no Affidavit of Services was ever submitted in support of these fees as required by R. 4:42-9(a)(2). Fischbein Badillo continued to carry out the instructions of [Salvatore] in spite of the fact that it was clear to them based upon Dr. Schlessinger's examination in January of 1998 that she was not competent to make financial decisions . . . . In spite of their concerns with respect to [Salvatore's] request for a new Will and in spite of her obvious lack of capacity, Fischbein Badillo nevertheless drafted the new Will. At the very least, this is a breach of the fiduciary duty of [Salvatore] as a director of the new Niles Foundation. He attempted to divert the estate of Laura from the charities to his mother, Serena. It is obvious to the Court that once Dr. Schlessinger had released his conclusion of lack of competency in January of 1998 and with no contrary opinion being obtained by Fischbein Badillo, that from that period on the services that they continued to render in this litigation were rendered for [Salvatore] individually and not for Laura . . . . [Salvatore's] actions were obviously not for

the benefit of Laura, but for the benefit of himself, his mother and his children. . . .

[Salvatore] paid out legal fees of $106,804 to the firm of DeFeis, O'Connell and Rose, a New York firm that was denied admission pro hac vice by this Court on April 9, 1998 and therefore, had no authorization to represent [Salvatore] in New Jersey. . . .

[Salvatore] incurred accounting and investigation fees of $134,285 for accountants and for private investigators to pursue Parkinson after Parkinson had been discharged and his accounting approved by the Court. Therefore, the Court concludes that these monies were used to attack Parkinson for bringing this action rather than to benefit Laura.

Substantial reductions in principal were made by [Salvatore] as trustee to meet the expenses set forth above. This in spite of the fact that the three trust instruments provided that principal could not be used without the written request of Laura. No evidence has been presented to the Court that that was ever obtained by [Salvatore] in spite of these substantial expenditures of principal.

There was $51,000 missing from [Salvatore's] accounting with respect to the Tilo Farms, the business name of Laura's

Blairstown residence. Since [Salvatore] elected not to appear at the continuation of the plenary hearing in July, 1999, there was no opportunity to question him on this item. Schrager testified at the plenary hearing that his treatment of the compensation agreement in drawing down $200,000 in compensation for slightly more than a year of service was a "breach of fiduciary duty."

For all these reason, the court concludes that [Salvatore] should never again be a fiduciary with respect to the trusts or the estate of Laura. For the reasons set forth above, he continued to misuse his relationship to further his own needs and those of his family members under the false premise that he was acting at the request of Laura.

. . . .

The Court finds the conduct of [Salvatore] inexcusable and reprehensible and his permanent removal is not only justified– it is demanded. The Court therefore, permanently removes [Salvatore] as trustee of the revocable trust, Crut I & Crut II of Laura, as Attorney-in-Fact for Laura and as director of the Niles Foundation.

[Citations omitted.]

In further analyzing the misappropriations, the judge assessed surcharges against Salvatore in the amount of $361,800. An order and judgment memorializing those findings and conclusions was executed on August 24, 1999.

Thereafter, Salvatore refused to attend scheduled, court-ordered depositions and refused to appear at the undue influence trial that commenced on September 21, 1999. The undue influence trial continued on September 22 and 23, 1999, October 25, 26, 27 and 28, 1999, November 1, 3, 4, 15 and 16, 1999, and concluded on November 17, 1999. Based on Salvatore's refusal to provide discovery and his refusal to attend the trial or be available as a witness, the judge ordered that Salvatore's pleadings be struck and default be entered against him.

On January 10, 2000, Judge Seybolt issued a written decision concluding, inter alia, that there was "no clearer case of undue influence than the one presently before this court."

The judge declared all modifications of the three trust agreements executed on May 21, 1997, as well as all amendments to Laura's will and powers of attorney executed thereafter, to be "null and void." The court reinstated all fiduciaries appointed by Laura prior to May 21, 1997, and appointed Parkinson as Laura's guardian. The findings and conclusions of the judge were memorialized in an order for judgment entered on January 21, 2000.

In reaching these conclusions, Judge Seybolt stated, in pertinent part:

> Upon Laura's return to the Blairstown, [Salvatore] . . . employed Gerald Schrager and Larry Gilberti . . . to do legal work regarding Laura's estate. The existing trust documents were brought to Blairstown by Schrager and Gilberti along with [Salvatore] and reviewed with Laura Niles on April 1, 1997 . . . . For the most part, this interview showed that Laura could respond to questions and did know the persons she had previously included in her estate plan. Laura expressed an interest in transferring the Florida condominium to Serena although she was clear that she did not want to retain Parkinson,

Selby or Lamb. She was not questioned to any extent for the reasons. Although Laura's answers for the most part seem responsive, neither Gilberti nor Schrager pursued the reasoning for the changes and never, outside the presence of [Salvatore], discussed his qualifications to be trustee of her rather large estate or director of her foundation . . . . When asked why she was so mad at Mr. Parkinson, her response was, "Because he cheated me." When you asked what makes you believe he cheated you, she responded, "Because there is no trust made for Carol's kids and he said he did. I was very surprised at this reaction." She further indicated that "He is not very trustworthy. I was so surprised." At the conclusion of the minutes, Gilberti asked Laura: "How did you become aware of Mr. Parkinson 'cheating' you?" Laura responded, "Mrs. Bono, Mrs. Niles, she said that he has not been on the up and up. She's been in business. She knows." It was obvious to the Court at this point that Serena and [Salvatore] had successfully worked their influence.

On May 8, 1997, an estate planning questionnaire was prepared and sent to Laura Niles. It was completed and sent back with handwritten changes; obviously not in her handwriting. A rather startling additions was included in the last page of the answer [.] . . . In someone's handwriting other than Laura Niles, Salvatore Bono was to receive

$1,000,000 to take as he wised. It was testified by Mr. Gilberti that he and Schrager recommended against this bequest as it would not look good. The word "void" was added over the note on this page by someone else in different handwriting from the bequest.

Documents were prepared and presented for signature by Laura Niles at Blairstown on Wednesday, May 21, 1997. A transcript was made of this session consisting of 73 pages and a videotape was also made of this session. Dr. Leslie Schlessinger was called upon to appear and give his opinion about Laura's competency. . . . [Salvatore] was not present in the room as far as the transcript and the videotape show. Laura asked for [Salvatore] so the Court concludes that he was present that day in Blairstown and had the opportunity to speak to Laura before the session began.

. . . .

Laura's competency on May 21, 1997 is not an issue, but the undue influence of Serena and [Salvatore] is very much an issue. A review of the transcript and videotape of May 21, 1997 indicates that Laura was answering questions, but was not giving directions . . . . Most of Laura's answers to Mr. Gilberti's questions were one word answers, usually "yes." On occasion, she would ask for [Salvatore]. She signed the documents as she was told. A view of the videotape indicated that Laura was frail and elderly at the time

of the signing of the documents on May 21, 1997 and very cooperative in completing the task.

. . . .

Upon the instructions of [Salvatore], a second modification and restatement was prepared for execution by Laura on August 15, 1997 at the offices of Fischbein, Badillo in New York City. A transcript was prepared of that meeting. The officers and directors of Laura J. Niles Foundation, Inc. had not resigned in accordance with the instructions sent by Schrager and Gilberti under a very weak signature of Laura on May 21, 1997. The purpose of the modification of August 15, 1997 was to replace the Laura J. Niles Foundation with a new foundation. When asked by Mr. Gilberti the reason for the change, Laura replied, "Well, because there is a certain trustee that we feel he wants too much, that he is not being quite honest." Note the reference to "we feel".

. . . .

Now before this Court is the issue of the alleged undue influence of Serena Bono and [Salvatore] in connection with the 1997 amendments to the Laura Niles three trusts, her last Will and Testament and the new medical power-of-attorney. Testimony was presented over twelve days . . . with closing

arguments on November 17, 1999. This Opinion of the Court now deals with that remaining issue. [Salvatore] never appeared at this hearing and on the first day of testimony, his attorney moved to be relieved and his request was granted. [Salvatore] was never thereafter heard from and is in default with respect to the allegations of his undue influence. Serena Bono was represented . . . and she appeared and gave testimony in her behalf.

. . . .

In determining whether a particular individual has been impelled to act under duress, all attendant circumstances including the age, capacity and relation of the parties must be considered as well as the exigencies of the situation in which the alleged victim finds himself.

In [Matter of Will of Liebl, 260 N.J. Super. 519 (App. Div. 1992), certif. denied, 133 N.J. 432 (1993)], the Court summarized the two elements necessary to give rise to a presumption of undue influence. The first being a confidential relationship between the testator and a beneficiary where the trust is reposed by reason of the testator's weakness or dependence or where the parties occupy relations in which reliance is naturally inspired or the fact exists. The second element must be the presence of suspicious circumstances which in combination with the confidential relationship will shift the

burden of the proof to the proponent. Such circumstances need be no more than slight.

. . . .

In the late 1980's, both Henry Niles and Laura Niles were in their late 70's and were relying on others for assistance in their daily living and in their financial decisions. Henry, although two years younger than Laura, was weaker physically than Laura, had no social life and rarely left his home in Brightwaters. Laura, on the other hand, attended dog shows regularly, had an apartment in New York City, a circle of friends and an interest in horses as well as dogs. However, Laura had persons caring for her, her Blairstown property and her animals on a full-time basis. She no longer drove a car and was becoming more dependent upon others.

. . . .

By 1997, Laura was 86 ½ years of age and dependent on the full-time nurses and the full-time assistance of Gregory [Drejka] and Romana [Baranska]. She went to the Florida condominium to stay with Henry and Serena during February and March of 1997. While there, she received the news of the sudden suicide death of her goddaughter and favorite, Carol Boehm. This was very upsetting to Laura and at this time when this frail, elderly woman was most vulnerable, Serena, with the

help of her son, [Salvatore], who also visited Florida at this time, increased the negativism directed at Parkinson and the need for someone else to look into her finances. Upon Laura's return to Blairstown at the end of March, 1997, [Salvatore] had arranged for attorneys at Fischbein, Badillo (Schrager and Gilberti) to remove Parkinson and to make extensive changes in Laura's estate plan. Notes of the meetings with Gilberti and Schrager confirm that Laura now, in her weakened condition, had a state of mind that Parkinson was dishonest and had been stealing from her. This confirms that she was taken advantage of in her weakened condition, to turn her mind away from her trusted advisor, Parkinson, and to place that trust into someone now. Serena had told Laura that with her business experience, she recommended her son, [Salvatore], who had now befriended Laura and convinced Laura that he was the one to handle here financial decisions. This was done without any know qualifications of [Salvatore] to be placed in a position to handle such a large amount of investments. Numerous documents were prepared and presented to Laura for execution on May 21, 1997. The videotape clearly shows that Laura was in a weakened condition and she had very little input into these wholesale changes presented to her at that time. Her answers as previously indicated were one word answers and showed very little, if any, original thought. Dr. Schlessinger was present on May 21st and although he found her competent enough to know

what she was doing, he concluded that she was suffering from some degree of dementia. He found her to be a frail, elderly woman who relied on maximum help from others with her activities of daily living and had significant impairments with respect to making complex decisions. Nevertheless, Laura signed all the documents and initialed them, transferring all control of her assets from Parkinson to [Salvatore] and made numerous other changes previously outlined in this Opinion.

After poisoning Laura's mind about Parkinson, [Salvatore], the one person whom Serena recommended that Laura place her confidence in, began to include himself as an object of her bounty.

. . . .

The Court concludes that the apparent age and frailty of Laura Niles, coupled with her vulnerability and complete dependence on others, created a confidential relationship with her sister-in-law, Serena and Serena's son, whom Serena had recommended as the proper person to give her advice. Witnesses from . . . Brightwaters, Blairstown and Florida convinced the Court that Serena dominated these households and those that worked in the household of these three localities. Laura was included in this dominance when both were residing at the same locale. Serena's dominance, coupled with Laura's weakness, creates the confidential relationship. Examples of the suspicious circumstances are

referred to throughout this Opinion. When Laura returned from Florida to Blairstown at the end of March, [1997], Serena ordered through Greg Drejka that Parkinson was not to communicate with Laura. True, Laura never attempted to call Parkinson, but at this time, she never made her own phone calls, but had others call for her and she was now convinced that Parkinson had been deceitful and was cheating her. The attempt by [Salvatore] to include himself in Laura's trust for $1,000,000 and his children for $500,000 each, clearly shows the intention of [Salvatore], who took complete charge over Laura's financial situation. The Court finds that not only has the plaintiff satisfied the burden of proof, but has provided the Court clear and convincing evidence which has not been rebutted that undue influence occurred and that all documents executed by Laura Niles beginning with the execution of the ten documents on May 21, 1997 and any documents executed in preparation for those modifications, are void as a matter of law, on the basis of undue influence.

. . . .

Laura suffered a severe stroke on September 9, 1997 and upon her release from rehabilitation several weeks later, was taken to Brightwaters to live under Serena's dominance. Serena, who requested funds to care for Laura , had access to Laura's credit

cards and through her son, [Salvatore], access to Laura's checking account. A $ 70,000 white Mercedes sedan was purchased by [Salvatore] of Laura, who hadn't driven in years and who thought it was a novelty.

Henry Niles died December 27, 1997 and Serena was faced with the termination of the monthly living allowance. Further amendments to the trust were contemplated by Serena and [Salvatore] and Dr. Schlessinger was then called in. Dr. Schlessinger, in his January, 1998 exam concluded that Laura Niles was no longer competent to execute documents with respect to her assets and her estate. This did not discourage Serena and [Salvatore]. [Salvatore] then requested that Gilberti prepare a third modification of the trust agreement which totally eliminated the Foundation as the residual beneficiary and distributed the residue of her estate (in excess of $20,000,000) outright to Serena. Gilberti admitted that he never conferred with Laura on this change, but nevertheless drafted the third modification. He began to have his doubts when [Salvatore] would not agree to confirmation from Laura and this third modification was never executed. This however clearly shows the state of mind of Serena and [Salvatore] who stand accused of undue influence of Laura. In addition, [Salvatore], who had criticized Parkinson for the management fees he had taken from the trust, managed to get an amendment of his services

> contract with Laura increased from $100,000 to $150,000 and in fact, took $200,000 in the last full year that he served as trustee.
>
> It is this Court's conclusion that there is no clearer case of undue influence than the one presently before this court.

A judgment memorializing the findings and conclusions contained in Judge Seybolt's January 10, 2000 written opinion was entered on January 21, 2000. In addition, that judgment permitted plaintiffs to file a surcharge and damages application for judgment against Serena and Salvatore for counsel fees and compensatory damages.

Pursuant to that judgment, Parkinson and the Foundation moved against Serena and Salvatore for imposition of attorneys fees, costs and compensatory damages. The trial court granted the applications and entered an amended final judgment on March 24, 200, assessing a total superceding surcharge against Salvatore in the amount of $805,727; a surcharge against Serena in the amount of $162,014; $314,282 for legal fees

incurred in connection with the litigation, for which Serena and Salvatore were made jointly and severally liable; and $50,000 in compensatory damages for which Salvatore and Serena were also jointly and severally liable.

Plaintiffs had sought legal fees and compensatory damages against Serena and Salvatore in the total amount of $2,987,106, consisting of legal fees and costs of $2,199,077, and compensatory damages in the amount of $788,029. In considering plaintiffs' application and rendering his decision at the March 24, 2000 hearing Judge Seybolt stated, in pertinent part:

> This court will first address the issue of compensatory damages. The court is convinced that [Salvatore] should not be permitted to retain the $200,000 in compensation for being trustee, because he attained the position as a result of undue influence.
>
> As to the other requested compensatory damages, the court affirms its decision in the earlier opinion. The court surcharged $50,000 against Salvatore Bono for improper credit

card, cash and check expenditures, because those funds were used for Mr. Bono's personal gain. Serena Niles had access to those funds as a result of her undue influence and should not be able to benefit. In the August 3, 1999 opinion, the court found that much of the credit card use was not for Laura, but was for Serena and the Bono family. These sums were used with gross carelessness or indifference to Laura's wishes. Since both [Serena] and [Salvatore] benefitted from those charges . . . they shall be jointly and severally liable for that $50,000. This is not $50,000 in addition, 50,000 already surcharged against [Salvatore] is the same $50,000, jointly and severally.

The court charged [Salvatore] 35,000 for investigation fees. There has been no demonstration that Serena Niles directed Salvatore Bono to initiate this investigation. Therefore, Serena Niles will not be surcharged for those fees. [Salvatore] will remain surcharged for those.

In the earlier opinion, the court did not surcharge [Salvatore] for accounting fees. However, based upon the findings of undue influence, [Salvatore] . . . should be charged $99,276 for those accounting fees . . . However, there has been no finding that [Serena] directed [Salvatore] to do these actions. Therefore, these funds will not be surcharged against [Serena].

In the earlier decision, the court reserved decision on whether to surcharge [Salvatore] for the Fischbein Badillo legal fees . . .

It is my understanding that they are not seeking . . . additional counsel fees from the trust, but nevertheless were paid sums of money for their alleged representation of Laura Niles. These fees arose from amendments made to the trust and trust amendments resulted from Salvatore Bono and Serena Niles' undue influence. Therefore, the Fischbein, Badillo fees shall be surcharged to Serena Niles and Salvatore Bono jointly and severally.

Plaintiff[s] move for Salvatore Bono and Serena Niles to be surcharged for all of the legal fees resulting from this case. Based on the [In re Landsman, 319 N.J. Super. 252 (App. Div.), certif. denied, 161 N.J. 335 (1999)] decision this court believes that it is authorized to compel [Salvatore] and [Serena] to pay their own legal fees, because it would be inequitable for the court to conclude that the estate should have to pay the legal fees for the individuals who unduly influenced. Therefore, Serena Niles, will be surcharged $162,014 for the fees of the Novick firm [, her attorneys].

[Salvatore] has previously been surcharged $106,804 for the fees of DeFeis, O'Connell and Rose. In the earlier proceeding

the court declined to surcharge [Salvatore] for the services provided by Sills, Cummis. However, since those fees were generated to defend [Salvatore's] position gained as a result of undue influence, the court will now surcharge [Salvatore] $128,640 representing Sills, Cummis fees and the $236,007 for the Cohn Lifland fees. These fees directly resulted from [Salvatore's] attempt to defend his undue influence. This sum should not be paid by the trust.

Mr. Parkinson also moves for [Serena] and [Salvatore] to be surcharged for the attorney's fees of other parties in this case. This Court does not find any basis in Landsman to shift the attorney's fees from the other parties to [Salvatore] and [Serena]. In Landsman, the Appellate Division did not state that a party found to have committed undue influence is bound to pay the attorney's fees of all parties involved. The court stated the party found guilty of undue influence must bear its own legal expenses.

. . . .

I am not surcharging [Salvatore] the $19,000 [loss] for the Mercedes. Because it was purchased for Laura Niles at a time when [it] became property of the estate, therefore, it becomes an asset of the trust. Whether it was lost value, whether it was a lousy investment, perhaps, I am not going to

surcharge $19,000.

[Other citations omitted.]

The amended final judgment entered on March 24, 2000, memorializes the final rulings of Judge Seybolt. In August 1998, Laura slipped into a coma from which she never recovered.

On appeal, Salvatore presents the following arguments for our consideration:

POINT I
THE SURCHARGES, ATTORNEYS' FEES AND DAMAGES IMPOSED AGAINST BONO IN THE FINAL JUDGMENT MUST BE VACATED BECAUSE PARKINSON LACKED STANDING TO OBJECT TO THE ACCOUNT AND HE HELD NO CLAIM THAT WAS RIPE FOR ADJUDICATION. THE ORDER SETTLING PARKINSON'S ACCOUNT MUST ALSO BE VACATED.

POINT II
THE FINAL JUDGMENT INVALIDATING THE MAY 21, 1997 LAST WILL AND TESTAMENT OF LAURA J. NILES WHILE SHE WAS ALIVE MUST BE VACATED AS THAT CLAIM WAS NOT RIPE AND THE ORDER REMOVING BONO AS TRUSTEE OF THE NILES

FOUNDATION, INC., A NEW YORK NOT-FOR PROFIT CORPORATION, MUST BE VACATED FOR LACK OF SUBJECT MATTER JURISDICTION.

A. The Final Judgment Erroneously Purports to Invalidate any Testamentary Instrument Not Submitted for Probate and Such Decree Must be Vacated.

B. The Chancery Division's Jurisdiction over New Jersey Trusts and Trustees Did Not Extend to Removal of a Director of a New York Not for Profit Foundation.

POINT III

SELVAGGI WAS IMPROPERLY APPOINTED AS GUARDIAN AD LITEM AND TEMPORARY TRUSTEE OF LAURA NILES ON THE EX-PARTE APPLICATION OF PARKINSON, THIS APPOINTMENT PREJUDICED LAURA NILES AND BONO AND THEREFORE THE JUDGMENT MUST BE REVERSED.

A. The Ex-Parte Appointment of Selvaggi as Guardian at the Behest of Parkinson Was Not Authorized as a Matter of Law and The Appointment Cannot Stand.

B. Selvaggi's Selective Invocation of the Attorney Client Privilege and His Inaccurate Report Prejudiced the Rights of Laura Niles and Bono.

1. Selvaggi's Conduct in Waiving The

Attorney-Client Privilege Prejudiced
The Rights of Laura Niles.

2. Selvaggi's Conduct in Preparing a Guardian Ad Litem Report Which Was Inaccurate, His Refusal to Release His Notes of the Interviews After Witnesses Certified Statements Ascribed to Them Were Inaccurate or Never Said, Caused The Court to Find a Prima Facie case of Undue Influence And Prejudiced Bono.

POINT IV

THE COURT BELOW ERRED IN SUMMARILY REMOVING BONO AS TRUSTEE PENDING FINAL DETERMINATION BECAUSE THERE WERE DISPUTED ISSUES OF MATERIAL FACT.

POINT V

THE DECISION TO ENTER DEFAULT WITHOUT PROPER NOTICE, AS REQUIRED BY RULE 1:6-3, THE FAILURE TO CONSIDER LESS DRASTIC REMEDIES, AND THE TOTAL EXCLUSION OF BONO AND HIS ATTORNEY FROM ANY PARTICIPATION IN THE PROOFS HEARING AND DAMAGES HEARING, VIOLATE HIS DUE PROCESS RIGHTS AND HIS RIGHTS UNDER NEW JERSEY LAW AND REQUIRE REVERSAL.

A. The Motion for Entry of Default Was Defective as a Matter of Law and the Application Should Have Been Summarily Denied.

B. The Lack of Sufficient Notice and an Opportunity to Be Heard in Person or Through Counsel Prior to the Entry of a Money Judgment Exceeding One Million Dollars Constituted a Deprivation of Bono's Rights to Due Process of Law.

C. The Court Below Abused its Discretion by Failing to Consider Less Severe Sanctions and in Precluding Participation in the Damages Phase of the Trial.

POINT VI

THE DENIAL OF THE MOTION FOR JUDGE SEYBOLT'S RECUSAL IS REVERSIBLE ERROR BECAUSE JUDGE SEYBOLT HAD AN INTEREST IN THE OUTCOME OF THE CASE AND WAS LITIGATING AGAINST BONO IN THE FEDERAL CIVIL RIGHTS AND RICO CASE.

A. This Court Should Take Judicial Notice of Bono's 1983 and Civil RICO case Against Judge Seybolt When Considering Judge Seybolt's Refusal to Recuse Himself From This Case.

B. Judge Seybolt's Interest in the Outcome of the Action He Presided Over, Coupled With His Taking a

Position Concerning the Merits of Bono's Complaints About Him, Required His Recusal to Maintain Confidence in the Judiciary.

1. The requirement in Canon 3(c) of the Code of Judicial Conduct, Which Requires a Judge to Recuse Himself Whenever His Impartiality Might Reasonably be Questioned, Is To Be Strictly Enforced and Any Doubts Resolved in Favor of Recusal.

2. A Reasonably Objective Observer or Member of the Public, Knowing All of the Facts About Judge Seybolt's Conduct After Becoming a Defendant in the Federal Lawsuit Might Question his Partiality and Therefore Recusal Was Mandated.

   A. Judge Seybolt's Filing of a Motion to Dismiss Bono's Complaint and Taking a Position as to its Merits Would Reasonably be Perceived as His Taking a Position Against Bono and Aligning Himself With the Other Litigants Who Were Also Joined in the Federal Lawsuit.

   B. Judge Seybolt's Complete and Drastic Change in His Perception of What the Videotape of Laura Niles Showed About her Condition, Which Occurred After He Received the Amended Complaint in the Federal Lawsuit Initiated by Bono, Are Such That a Reasonable Observer Might Question His Impartiality.

C. The Extreme Rulings Made by Judge Seybolt Against Bono After He Filed The Federal Lawsuit Are Such That a Reasonable Objective Observer Might Question His Impartiality.

POINT VII

THE JUDGMENT SHOULD BE VACATED AND BONO GIVEN AN OPPORTUNITY TO LITIGATE THE UNDUE INFLUENCE ISSUE BEFORE A DIFFERENT JUDGE BECAUSE THE RECORD DEMONSTRATES THAT THERE IS MERIT TO BONO'S ASSERTION THAT THE INSTRUMENTS WERE THE PRODUCT OF LAURA NILES' FREE WILL, WITH THE AID OF HER INDEPENDENT COUNSEL.

A. The Dispositions Made by Laura Niles Were Presumptively Valid and Enforceable.

B. Only Influence Which is So Strong as To Destroy the Free Agency of the Testator Can Rebut the Presumption of Validity of the Instruments that Person Signed.

C. Parkinson Failed to Establish that Each and Every Instrument and Will Which Parkinson Challenged Was the Product of Undue Influence.

1. Laura Niles' Mental Acuity, Strength of Will And Emotional Health Both Before And After The 1997 Florida Trip and Including The Times

When The Documents In Question Were Executed Show that She Was Not The Victim of Undue Influence.

2. Laura Niles' Representation by Independent Counsel at the Time the Trust Amendments Were Carried Out Undermines Parkinson's Undue Influence Claim.

3. Laura Niles' Independent Complaints About Parkinson, Selby, and Lamb Demonstrate That Her Decision to Replace Them Was Not The Result of Undue Influence.

POINT VIII

THE AWARD OF MONEY DAMAGES MUST BE VACATED BECAUSE PARKINSON FAILED TO SHOW HE WAS DAMAGED AND IT WAS IMPROPER TO DIRECT SALVATORE BONO TO PAY ATTORNEY FEES INCURRED FOR REPRESENTATION OF LAURA NILES AND THE TRUSTS, AND TO AWARD COMPENSATORY DAMAGES TO LAURA NILES, WHO WAS NOT A PARTY TO THE ACTION.

On appeal, Serena presents the following arguments in support of her appeal for our consideration:

POINT I

THE EVIDENCE BEFORE THE TRIAL COURT WAS INSUFFICIENT AS A

MATTER OF LAW TO SUPPORT A FINDING OF UNDUE INFLUENCE AS TO THE DEVISE OF THE FLORIDA CONDOMINIUM.

POINT II
THE TRIAL COURT ERRED IN ASSESSING FEES AND COSTS AGAINST SERENA NILES.

In their cross-appeals, the Foundation and Parkinson present the following arguments:

THIS COURT SHOULD DIRECT THE TRIAL COURT TO ENTER JUDGMENT JOINTLY AND SEVERALLY AGAINST SAL BONO AND SERENA NILES IN THE AMOUNT OF $2,987,106.

A. The Estate Is Entitled to Restitution From the Bonos For All Legal Fees Incurred As A result of Their Undue Influence.

B. The Unauthorized Expenditures.

C. The Damages For The Commissions And The Accounting and Investigators' Fees Assessed Against Salvatore Bono Should be Affirmed For The Reasons Stated By The Trial Court; However, The Trial Court Erred By Not Assessing These Same Damages Against Serena Bono Niles.

After carefully reviewing the record in the light of the written and oral arguments presented by the parties, we conclude that the claims advanced by Salvatore and Serena are without sufficient merit to warrant extensive discussion in this opinion, R. 2:11-3(e)(1)(A) and (E), and we affirm substantially for the reasons articulated by Judge Seybolt in his thoughtful and comprehensive written opinions dated August 3, 1999 and January 10, 2000 and in his oral opinion delivered on March 24, 2000. The findings of the judge are supported by substantial, credible evidence contained in the record, Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974), and his conclusions predicated on those findings are legally sound. Lavin v. Hackensack Bd. of Educ., 90 N.J. 145, 151-53 (1982). We add the following.

Salvatore's argument that Parkinson had no standing to object to Salvatore's accounting, although not raised below, is without merit. Parkinson clearly had a right, and thus had a

standing, to object to Salvatore's accounting. The litigation was commenced when Parkinson, as trustee of the Foundation, filed a verified complaint, seeking not only an allowance of the settlement of his account of the trust assets, but also seeking appointment of a guardian ad litem to protect Laura's interest from acts of improper influence by Salvatore and Serena, made possible because of Laura's frail health. Since Parkinson was responsible for the court's order directing Salvatore's accounting, Parkinson could not be deemed as a stranger or interloper to the action. As the person who for years had taken care of Laura's financial affairs and had acted as her trustee and fiduciary, Parkinson had a direct stake in protecting Laura's estate from the consequences of Salvatore's manipulation and improper influence. Salvatore's reference and reliance on an analytical extrapolation from N.J.S.A. 3B:14-4 is both inappropriate and misplaced. There can be no question that Parkinson was an "interested person" and, as such, was clearly

entitled by R. 4:87-8 to file exceptions to Salvatore's accounting.

Salvatore's arguments that the Probate Part lacked jurisdiction to invalidate Laura's 1997 will because only a probated will contest could have invoked the court's jurisdiction, is without merit. The 1997 will was vacated as a result of the court's determination that its execution was not a product of Laura's own free will but, rather, the result of the undue influence of Serena and Salvatore. Nothing about these proceedings and subsequent findings invoked or required the probate procedures. Vacation of the 1997 will and the other documents was the logical remedy once the finding of undue influence was made. The court properly acquired jurisdiction over each aspect of Laura's affairs tainted by the undue influence.

Although it appears the trial court had no jurisdiction over the Niles Foundation, which was incorporated in the state of

New York on August 14, 1997, the invalidation of the 1997 estate plan and documents, and reinstatement of the previous estate plan, deprived the 1997-created Niles Foundation of any interest in Laura's estate, as the 1992-created Foundation was the residual beneficiary of Laura's assets under 1992 will. Thus, although the trial court had no authority to remove Salvatore as a director of the 1997 New York charitable corporation, that entity no longer had a purpose, funding source, or link to Laura.

There was nothing improper in the appointment of Selvaggi as guardian ad litem for Laura. The procedures used conformed to applicable court rules. See R. 4:67; R. 4:83; R. 4:87-1(a). Additionally, as Laura's duly appointed guardian ad litem, Selvaggi clearly had the right to exercise or waive the attorney-client privilege Laura enjoyed as long as doing so was in her best interest. The record is clear that Selvaggi acted in Laura's best interest at all times.

Salvatore's reliance upon Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349 (App. Div. 1985), to support his contention that his summary removal on September 24, 1998 as trustee pending final disposition was improper without an evidential hearing, is misplaced. Initially, we note that this claim is moot, because Salvatore was eventually permanently removed after a full plenary hearing in which he chose not to participate. In Wolosoff, supra, the trustees were permanently removed on the basis of affidavits and oral arguments. 205 N.J. Super. at 364-66. Here, Salvatore's initial removal on September 24, 1998, was temporary, and was largely based upon a comprehensive report from the guardian ad litem.

We also conclude that given Salvatore's conduct during the proceedings before the trial court, the trial judge did not abuse his discretion in finding Salvatore in default, striking his pleadings, and entering judgment against him. Salvatore refused to appear for the continuation of his deposition, despite

a court order requiring him to do so. The record is replete with other instances of Salvatore's lack of participation and cooperation with the court and counsel. The trial judge exercised remarkable restraint throughout and displayed a clear and constant intent to provide Salvatore ample and adequate opportunity to be heard. Salvatore's claims of inadequate notice are meritless; he made it clear that he had no intention of appearing before Judge Seybolt for any purpose. Salvatore's own actions and conduct decry his current complaints.

Although the trial judge probably should have permitted Salvatore's counsel to participate in the cross-examination of witnesses on the issue of damages, we find no prejudice to Salvatore in that regard. The record is clear that Salvatore wanted to discharge his counsel and did not authorize such participation. Moreover, Serena was in the same position as Salvatore with respect to the undue influence allegations;

Serena's counsel fully cross-examined all of the witnesses as to both liability and damages.

We are satisfied Judge Seybolt properly exercised his sound discretion in denying Salvatore's application for recusal; recusal rests in the sound discretion of the trial judge whose impartiality is challenged. Panitch v. Panitch, 339 N.J. Super. 63, 66 (App. Div. 2001); Jadlowski v. Owens-Corning, 283 N.J. Super. 199, 221 (App. Div. 1995), certif. denied., 143 N.J. 326 (1996). The record more than adequately demonstrates that Judge Seybolt presided over this matter even-handedly, exhibiting no bias whatsoever. The record also clearly reflects that Salvatore's conduct in instituting the federal action was a tactic improperly designed to create a conflict where none existed and to obfuscate the proceedings.

The findings of the exercise of undue influence by Serena and Salvatore on Laura, and the imposition of fees, costs and surcharges against Serena and Salvatore are fully supported by

the evidence contained in the record. Salvatore's claim that Parkinson was obliged to prove that he personally suffered monetary damages misconstrues that nature of the action. Parkinson was not seeking to recover for an injury to himself. Rather, his action was brought initially as a complaint to settle his accounting and for appointment of a guardian ad litem to investigate the necessity to protect Laura from undue influence. At no point was Parkinson seeking to redress a wrong committed against him personally. The proofs at the hearings were taken to resolve questions of whether the actions of Salvatore and Serena had resulted in damages to Laura's estate. Accordingly, Parkinson was under no obligation to prove that he had suffered damages personally.

The surcharges for attorneys' fees paid to the Fischbein Badillo and DeFeis, O'Connell and Rose law firms were proper because they were only incurred because Salvatore sought legal representations to improperly charge Laura's estate plan.

Although technically representing Laura, they did so at Salvatore's behest. Ultimately, those services were incurred not for Laura's benefit but for the benefit of Salvatore and Serena. Certainly, the incurrence of those fees constituted a breach of Salvatore's fiduciary duty and were recoverable.

Additionally, viewing the matter from the equitable perspective required by Landsman, supra, the exercise by Serena of undue influence to procure the results manifested by the 1997 invalidated documents, justified imposition of a joint and several obligation upon Serena for those counsel fees on equitable principles, notwithstanding her lack of "fiduciary" status. 319 N.J. Super. at 276.

It was clear from the evidence that Serena was the driving force behind the changes Laura made to her estate plan documents in 1997 so as to benefit herself, Salvatore and their family members. Moreover, it is Serena who initiated the undermining of Parkinson by her constant baseless comments,

criticisms, and accusations of his financial treachery and dishonesty. We also find no basis or justification in the record for imposing upon Laura's trust the obligation to pay Serena's counsel fees.

Parkinson and the Foundation contend the trial court assessed inadequate damages against Salvatore and Serena such that Laura's estate was not made whole. Although, in our view, the trial court's reference to Landsman, supra, as providing inadequate authority for imposition of all counsel fees against a purveyor of undue influence, was too narrow, the record submitted does not support plaintiffs' claim. Plaintiffs' application for the assessment of those counsel fees does not disclose precisely what services rendered, for what purpose, and why the estate was obligated by the court to pay them.

We also accord deference to the trial judge's exercise of discretion in setting the amount of compensatory damages. The record contains only a list of the charges from the credit card

statements indicating where the purchases had been made, and the amount of the checks written on Laura's account to cover those charges. No other details were made available concerning the precise nature of the purchases, some of which could reasonably have been necessary for Laura's maintenance. In the absence of more specific proof, we defer to the discretion of the trial judge and his feel for the case.

Affirmed.

IN THE MATTER OF THE

TRUST CREATED MARCH 31, 1992 BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE;

TRUST CREATED MARCH 31, 1992, BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE; and

AMENDED JUDGMENT

TRUST CREATED AUGUST 23, 1994, BETWEEN LAURA J. NILES, GRANTOR, and GEOFFREY M. PARKINSON, TRUSTEE.

WHEREAS this matter was commenced by way of a Verified Complaint filed by Geoffrey M. Parkinson on January 20, 1998; and

WHEREAS on January 26, 199, the Laura J. Niles Foundation, Inc., filed a Verified Complaint as well, which was consolidated with the Parkinson Complaint by way of order

dated March 12, 1999, and which was subsequently superceded by a First Amended Verified Complaint, and

WHEREAS by order of the Court, defendant Salvatore Bono submitted accountings in this action; and

WHEREAS the Court conducted a hearing on April 21, May 3-4, and July 12,-15 to consider said accountings and exceptions thereto filed by plaintiffs; and

WHEREAS at the conclusion of said hearing this Court entered an opinion and order dated August 24, 1999, in which it (a) found that Salvatore Bono had committed numerous acts of malfeasance, negligence, and self-dealing as trustee of Laura Niles, (b) permanently removed Salvatore Bono as trustee and fiduciary to Laura J. Niles; (c) removed Salvatore Bono as a director of the Niles Foundation, and (d) imposed sanctions against Salvatore Bono in the amount of $361,800, without prejudice to plaintiffs' right to request further surcharges at the conclusion of the merits trial; and

WHEREAS on the first day of the plenary hearing on the merits of this matter (September 21, 1999), this Court found Salvatore Bono in default for a variety of reasons set forth on the record, including, in particular, his repeated failures to appear for court-ordered depositions and his failure to appear at trial; and

WHEREAS the Court thereafter proceeded with a plenary hearing on the merits of the allegations in the consolidated complaints, with the sole defendant being Serena Niles; and

WHEREAS this Court issued a Letter Opinion dated January 10, 2000 in which it made findings of fact and conclusions of law based upon the testimony of the witnesses and the numerous exhibits in evidence; and

WHEREAS the Court found, among other things, that (a) as of January 1997, Laura Niles suffered from significant mental impairments that made her vulnerable to undue influence; (b) as of January 1997, Salvatore Bono and Serena Niles had

developed a confidential relationship with Laura Niles; (c) suspicious circumstance exited sufficient to shift the burden of proof to the defendants, (d) Salvatore Bono and Serena Niles abused the trust and confidence Laura Niles placed in them by (among other ways) repeatedly telling her falsely that Mr. Parkinson was "cheating" her, "lying" to her, and "couldn't be trusted"; (e) Laura Niles, because of her mental and physical limitations at the time, was unable to resist these false and defamatory suggestions; (f) as a result of undue influence exerted upon her by Salvatore Bono and Serena Niles, Laura Niles signed the subject documents on May 21, 1997 and August 15, 1997, which, among other things, transferred control over her estate to Salvatore Bono; and (g) working in concert, Salvatore Bono and Serena Niles further abused the trust and confidence Laura Niles placed in them by, among other things, attempting further changes to her will, using her credit cards, checks and cash for personal expenditures, obtaining improper

and unauthorized compensation for Salvatore Bono, and using the funds in the trusts for wholly improper purchases; and

WHEREAS Salvatore Bono's and Serena Niles' conduct is the proximate cause of substantial economic harm to Laura Niles, including substantial legal fees paid during the pendency of this proceeding; and

WHEREAS plaintiff's complaints request the imposition of damages, fees and costs; and

WHEREAS it is appropriate and reasonable to require Salvatore Bono and Serena Niles to (a) bear some of the burden of the legal fees and costs paid in connection with this litigation, and (b) compensate the trusts for additional damages caused by their conduct; and

WHEREAS the Judgment previously entered by the Court in this matter on January 21, 2000, expressly provides that plaintiff's attorneys "may move before this Court by January 28, 200, on notice to all remaining parties, returnable Friday

February 25, 2000, directing the defendants, Salvatore Bono and Serena Niles, to pay legal fees, costs and compensatory damages to the Laura J. Niles trusts"; and

WHEREAS plaintiffs having moved for such relief by a way of motion with notice to the remaining parties; and

FOR ALL of the reasons set forth in the Letter Opinion dated January 10, 2000 and for the additional reasons stated by the Court on the record on March 24, 2000;

ORDERED, ADJUDGED, and DECREED as follows:

A. Judgment is hereby entered in favor of plaintiffs Geoffrey M. Parkinson and the Laura J. Niles Foundation, Inc., against defendants Salvatore Bono and Serena Niles with respect to all allegations of undue influence in the Verified Complaint of Geoffrey Parkinson and with respect to Counts One and Two of the First Amended Complaint of the Laura J. Niles Foundation, Inc.

B. Declaratory and injunctive relief is hereby

granted as follows:

(1) The "Modification and Restatement of Trust Agreement" dated May 21, 1997, the "Second Modification and Restatement of Trust Agreement" dated August 15, 1997, and all other wills, codicils, trust agreements, trust amendments, documents affecting powers of attorney, and other testamentary or trust documents signed by Laura J. Niles on or after January 1, 1997, are hereby declared NULL and VOID.

(2) The personal assets of Laura Niles and the assets held in trusts established by Laura Niles are hereafter governed by the provisions of the trust documents, wills, codicils, and other testamentary documents in effect as of January 1, 1997, except to the extent otherwise provided settlement agreements duly entered into and accepted by this Court in this matter.

(3) Geoffrey M. Parkinson is hereby reinstated as the executor, trustee, and attorney-in-fact for Laura J. Niles, and he

is hereby appointed guardian of Laura J. Niles, subject to being duly qualified by the Warren County Surrogate.

(4) Michael Selvaggi, Esq., is hereby discharged as temporary trustee and guardian of Laura J. Niles, and he is directed to submit an accounting within sixty (60) days of the entry of this order.

(5) In accordance with paragraph 8 of the consent order filed October 28, 1999, between plaintiffs, Edward Glynn, Esq., on behalf of the minors and Darryl Grosso, and Michael Selvaggi, Esq., the temporary trustee and guardian of Laura Niles, the Court hereby appoints Beacon Trust Company trustee of the trusts established thereunder and, by virtue of said appointment, relieves Geoffrey M. Parkinson of all duties and obligations as trustee for the trusts of the minors and Darryl Grosso arising from the prior Judgment entered on January 21, 2000. It is further ordered that upon the death of Laura Niles, the Surrogate shall pay out proceeds for the minors and Darryl

Grosso, as directed by the consent order, to the trustee appointed herein, to be held in trust in accordance with the provisions of said consent order.

(6) A. Daniel D'Ambrosio, Esq., is hereby appointed to the Board of Directors of the Laura J. Niles Foundation, Inc. The Foundation shall take any and all steps necessary and proper to alter and/or amend the corporate papers to add M. D'Ambrosio to the Board of Directors, and to grant him full rights and privileges as a member of said Board.

(C) Fees, Costs, and Monetary Damages:

(1) A surcharge is assessed against Salvatore Bono in the amount of $805, 727, and is hereby final and immediately payable.

(2) In addition, Serena Niles is assessed a surcharge in the amount of $ 162, 014.

(3) In addition, Salvatore Bono and Serena Niles are jointly and severally liable to the Laura J. Niles Revocable Trust

Created March 31, 1992, in the amount of $314, 282 for legal fees incurred in connection with this action.

(4) In addition, Salvatore Bono and Serena Niles are jointly and severally liable to the Laura J. Niles, for compensatory damages in the amount of $50,000.

F. This Amended Judgment shall and does hereby supercede the Judgment previously entered in this matter on January 21, 2000.

E. A copy of this Order shall be served on counsel for all parties within 5 days of entry.

_____

Harry K. Seybolt, J.S.C.

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF, LLP
Attorneys for Salvatore A. Bono
Park 80 Plaza West One
Saddle Brook, New Jersey 07663
(201) 845-9600
Our File: 34, 405

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
WARREN COUNTY
DOCKET NO: P-98-043d

IN THE MATTER OF THE TRUST
CREATED MARCH 31, 1992 BETWEEN
LAURA J. NILES, GRANTOR, and
GEOFFREY M. PARKINSON, TRUSTEE;

TRUST CREATED MARCH 31, 1992,
BETWEEN LAURA J. NILES, GRANTOR,
and GEOFFREY M. PARKINSON,
TRUSTEE; and

AMENDATORY ORDER

TRUST CREATED AUGUST 23, 1994,
BETWEEN LAURA J. NILES, GRANTOR,
and GEOFFREY M. PARKINSON,
TRUSTEE.

THIS MATTER having been brought to the attention of the Court by Cohn Lifland Pearlman Herrmann & Knopf, LLP,

counsel for defendant, Salvatore A. Bono; and the Court having previously entered an Order dated September 21, 1999 granting "judgment by default" and the Court having considered the arguments of counsel and for other good cause shown:

IT IS on this 30th day of September, 1999;

ORDERED:

1. That this Court's Order of September 21, 1999 entering judgment by default against defendant, Salvatore A. Bono, is hereby vacated; and it further ordered

2. That the pleadings of Salvatore A. Bono are hereby stricken and default is entered against him pursuant to R. 4:23-2(b)(3); and it is further ordered

3. That a copy of this Order shall be served on all counsel within 5 days from the date hereof.

_____

HON. HARRY K. SEYBOLT, J.S.C.

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISIONS OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
25 MARKET STREET
PO BOX 112
TRENTON, NJ 08625-0112
E-Mail: catinodon@law.dol.lps.state.nj.us
(609) 292-8150

November 29, 1999

Mr. Salvatore A. Bono, Pro Se
2227 86th Street
Brooklyn, NY 11214

Re: Bono v. Barnosky, et al.
C.A. No. 99-3688

Dear Mr. Bono:

This is to inform you that defendant Judge Harry K. Seybolt joins in the motion to dismiss your RICO allegations made by Farrell Fritz, P.C. on behalf of John J. Barnosky.

Thank you very much for your consideration.

Sincerely yours,

JOHN J. FARMER, JR.
ATTORNEY GENERAL OF
NEW JERSEY

By: _____
Don E. Catinello
Deputy Attorney General

c: All counsel of record
Clerk of the Court
The Honorable Thomas C. Platt, U.S.D.J.

United States Constitution, Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW JERSEY COURT RULE 4:43-2. FINAL JUDGMENT BY DEFAULT

When a default has been entered in accordance with R. 4:43-1, except as otherwise provided by R. 4:64 (foreclosures), a final judgment may be entered in the action as follows:

(a) By the Clerk. If the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit setting forth a particular statement of the items of the claim, their amounts and dates, a calculation in figures of the amount of interest, the payments or credits, if any, and the net amount due, shall sign and enter judgment for the net amount and costs against such defendant, if not a minor or mentally incapacitated person. If prejudgment interest is demanded in the complaint the clerk shall add that interest to the amount due provided the affidavit of proof states the date of defendant's breach. If the judgment is based on a document of obligation that provides a rate of interest, prejudgment interest shall be calculated in accordance therewith; otherwise it shall be calculated in accordance with Rule 4:42-11(a). If the claim is founded upon a note, check or bill of exchange or is evidenced by entries in the plaintiff's book of account, or other records, a copy thereof shall be attached to the affidavit.

(b) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against a minor or mentally incapacitated person unless that person is represented in the action by a guardian or guardian ad litem who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, that party (or, if appearing by representative, the representative) shall be served with notice

of the motion for judgment filed and served in accordance with R. 1:6. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any allegation by evidence or to make an investigation of any other matter, the court may conduct such hearings with or without a jury or take such proceedings as it deems appropriate, and in that event, if the defendant was originally served with process either personally or by certified or ordinary mail, the attorney for the claimant shall give notice of the proof hearing to the defaulting defendant by ordinary mail addressed to the same address at which process was served. In tort actions involving multiple defendants whose percentage of liability is subject to comparison and actions in which fewer than all defendants have defaulted, default judgment of liability may be entered against the defaulting defendants but such questions as defendants' respective percentages of liability and total damages due plaintiff shall be reserved for trial or other final disposition of the action. If application is made for the entry of judgment by default in deficiency suits or claims based directly or indirectly upon the sale of a chattel which has been repossessed, the plaintiff shall prove before the court the description of the property, the amount realized at the sale or credited to the defendant and the costs of the sale. In actions for possession of land, however, the court need not require proof of title by the plaintiff. If application is made for the entry of judgment by default in negligence actions involving property damage only, proof shall be made as provided by R. 6:6-3(c).

(c) Conformance of Judgment With Pleading; Service of Judgment. Whether entered by the clerk or the court, the final judgment shall not be different in kind nor exceed the amount demanded in the pleading, except that in continuing causes, installments coming due after the filing of the pleading but

before entry of judgment may be added to the amount of the demand stated in the pleading. Within seven days after receipt of the executed judgment from the court, the proponent of the judgment shall serve a copy thereof on the defaulting defendant as required by R. 1:5-2 except that service may be made by ordinary mail alone.

(d) Failure to Apply for Judgment Within Six Months. If a party entitled to a judgment by default fails to apply therefor within four months after the entry of the default, the court shall issue a written notice to the party entitled to apply for entry of default judgment advising that the action will be dismissed without prejudice when six months have elapsed following the date of the entry of default unless within said period the party files application for entry of default judgment or by affidavit shows exceptional circumstances for the delay in seeking the judgment. If exceptional circumstances are shown, the court shall issue an order extending the time for entry of the judgment for a specified period, which may be further extended on motion. An application for entry of default judgment made after the expiration of six months following the entry of default shall not be granted except on notice of motion filed and served in accordance with R. 1:6.

NEW JERSEY COURT RULE 1:6-3. FILING AND SERVICE OF MOTIONS AND CROSS-MOTIONS

(a) Motions Generally. Other than an ex parte motion and except as otherwise provided by R. 4:46-1 (summary judgment) and R. 5:5-4 (c) (post judgment motions), a notice of motion shall be filed and served not later than 16 days before the specified return date unless otherwise provided by court order, which may be applied for ex parte. Thus, for example, if the

return date of the motion is a Friday, the motion must be filed and served not later than the Wednesday, 16 days prior. If a motion is supported by affidavit or certification, the affidavit or certification shall be filed and served with the motion. Except as provided by R. 4:49-1(b) (motion for new trial), any opposing affidavits, certifications or objections filed pursuant to R. 1:6-2 shall be filed and served not later than 8 days before the return date unless the court relaxes that time. Thus, for example, if the return date is on a Friday, any response must be filed and served no later than Thursday of the prior week. Reply papers responding to opposing affidavits or certifications shall be filed and served not later than 4 days before the return date unless the court otherwise orders. Thus, for example, such papers must be filed and served on Monday for a return date of the following Friday. No other papers may be filed without leave of court.

(b) Cross-Motions. A cross-motion may be filed and served by the responding party together with that party's opposition to the motion and noticed for the same return date only if it relates to the subject matter of the original motion. A cross-motion relating to the subject matter of the original motion shall, if timely filed pursuant to this rule, relate back to the date of the filing of the original motion. A cross-motion relating to the subject matter of the original motion shall, if timely filed pursuant to this rule, relate back to the date of the filing of the original motion. The original moving party's response to the cross-motion shall be filed and served as provided by paragraph (a) for reply papers. The court may, however, on request of the original moving party, or on its own motion, enlarge the time for filing an answer to the cross-motion, or fix a new return date for both. No reply papers may be served or filed by the cross-movant without leave of court.

(c) Completion of Service. For purposes of this rule, service of motion papers is complete only on receipt at the office of adverse counsel or the address of a pro se party. If service is by ordinary mail, receipt will be presumed on the third business day after mailing.

NEW JERSEY CODE OF JUDICIAL CONDUCT, CANON 3, SECTION C(1)(a)

(1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer or has personal knowledge of disputed evidentiary facts concerning the proceeding.

Nos. 02-1025 and 02-1038

MAR 10 2003
CLERK

IN THE

Supreme Court of the United States

SERENA NILES,

Petitioner,

-and-

SALVATORE A. BONO,

Petitioner,

v.

GEOFFREY M. PARKINSON,
as Trustee of the Laura J. Niles Trust, and
THE LAURA J. NILES FOUNDATION, INC.,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

JOHN A. RIDLEY
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QUESTIONS PRESENTED

1. Whether a litigant in a matter pending before a state court judge can, by filing a meritless federal suit naming the state court judge as one among 23 defendants, and thereby requiring the state's attorney general's office to appear on behalf of the judge and obtain a dismissal of the federal suit, force the recusal of the state court judge at the risk of creating a viable due process claim.

2. Whether a writ of *certiorari* should issue in a case in which: (a) the petitioner did not raise, and the court below did not address, the questions presented in the petition; (b) the decision as to which the petitioner seeks review is an unpublished opinion with no precedential value from an intermediate state appellate court; and (c) the judgment below is not final as to all issues among the parties.

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STATEMENT OF THE CASE

This is a story of extreme avarice and greed on the part of opportunists Serena Niles (hereinafter "Serena") and her son Salvatore A. Bono (hereinafter "Sal"), who sought to ravage the multi-million dollar estates of two physically and mentally infirm octogenarians.

The Laura J. Niles Foundation, Inc. (hereinafter "Foundation") is the remainder beneficiary of three inter-vivos trusts created by Laura J. Niles (hereinafter "Laura") between 1992 and 1994 of which Geoffrey M. Parkinson (hereinafter "Parkinson") was the trustee. Pa681a.[1]

Laura, a childless octogenarian who had never married, was the heiress to a $30 million fortune. Laura's younger brother, Henry E. Niles (hereinafter "Henry"), was likewise a never-married, childless octogenarian who was the heir to a similar size fortune. Parkinson was a life-long friend of the Niles family, as well as Laura's and Henry's financial adviser and the trustee of the trusts.

By the early 1990's, Henry was in physical and mental decline, to the point that he had become incontinent and had allowed himself to be swindled out of one million dollars by an unscrupulous broker. Because of this, a proceeding was commenced in New York state court to have his affairs placed in the hands of a conservator. Pa655a. Around the same time, Serena Bono (later Serena Niles), one of the owners of a

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1. For the purposes of this brief, references to the Appendix filed in the Appellate Division of the Superior Court of New Jersey on behalf of Geoffrey M. Parkinson will appear as "Pa__"; references to the Joint Appendix filed on behalf of Geoffrey M. Parkinson and The Laura J. Niles Foundation, Inc., will appear as "Ja__."

local restaurant who was approximately 30 years Henry's junior, began spending a considerable amount of time with him and subsequently announced that she would like to marry him. A temporary restraining order was entered in the conservatorship proceeding to prohibit the marriage from taking place while the matter was pending. Pa676a. Despite the restraining order, Serena married Henry in November, 1992. The conservator who was appointed in the New York proceeding sought to have the marriage annulled; however, that issue was resolved by the execution of a post-nuptial agreement limiting Serena's right to inherit from Henry's estate. Pa740a. (Following Henry's death, Serena sued to have the post-nuptial agreement set aside. That action eventually settled with Serena receiving millions.)

By 1997, Laura's health was in a fragile state; and she required daily nursing care. She had already been diagnosed as suffering from organic brain syndrome, rendering her cognitively impaired, particularly with respect to making personal and financial decisions. Parkinson, her long-time friend and financial advisor, was by then providing advice and services in that regard.

Serena, taking advantage of Laura's diminished capacity, began to insert herself into Laura's personal decision-making process and started a campaign of slander against Parkinson. About that same time, Serena's son Sal convinced Laura to meet with a law firm selected by him. The upshot was that in 1997 Laura signed a series of complex testamentary papers that made profound changes to her estate plan, including, *inter alia*, discharging Parkinson as her trustee and installing Sal in his place; revoking her Last Will and Testament and replacing it with an instrument making two million dollars in specific bequests to Sal's family, including his mother,

Serena; completely disinheriting the Foundation; and diverting the entire residuary estate to a new foundation controlled by Sal, Serena, and their business associates. Pa1019a-1092a.

Parkinson and the Foundation filed actions in the Superior Court of New Jersey, Chancery Division, Probate Part, Warren County, to invalidate the testamentary instruments executed by Laura in 1997 on the grounds that they had been procured through the undue influence of Serena and Sal. Pa1a, 371a, 394a. The presiding judge was the Honorable Harry K. Seybolt of the Superior Court of New Jersey. At an early point in the proceeding, Judge Seybolt appointed Michael S. Selvaggi, a Warren County attorney, to act on Laura's behalf as her guardian *ad litem*.[2, 3] Pa2a.

Parkinson and the Foundation ultimately prevailed in the trial court, which removed Sal as trustee, invalidated the 1997 testamentary papers thereby restoring Laura's prior Last

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2. On pages 10-11 of Serena's petition and on page 8 of Sal's, they claim that Parkinson had Mr. Selvaggi appointed through an *ex parte* proceeding with the court. That claim is patently false, and no evidence has ever been adduced to support it. Mr. Selvaggi was selected by the court. Parkinson, who lives and works in Connecticut, had never heard of Selvaggi prior to his appointment.

3. Serena and Sal also claim at pages 11 and 8, respectively, that 18 witnesses submitted affidavits stating that Selvaggi's report to Judge Seybolt misquoted them and falsified statements attributed to them. After our repeated and unanswered calls to produce the 16 alleged affidavits that are not in the record, counsel for Sal filed with this Court and served a notice of errata purporting to correct that misstatement, stating: "[a]t least two witnesses submitted . . . affidavits . . ." The fact of the matter is that *only* two such affidavits are part of the record or have ever been seen.

Will and Testament and the trusts, restored Parkinson as the trustee, and assessed damages against Serena and Sal. Pa498a, 550a. The judgment against Sal was ultimately by default. In his opinion, Judge Seybolt stated: "It is this Court's conclusion that there is no clearer case of undue influence than the one presently before this Court." Pa536a.

Judge Seybolt's decision to enter default against Sal was made after a full year of rampant and unrepentant litigation abuses by Sal — conduct that included defiance of court orders, refusal to provide crucial discovery, and, ultimately, failure to appear at trial. Ja97a-110a. Some of the "highlights" of Sal's misbehavior during the litigation include his:

- Sending a series of *pro se* letters to the trial court teeming with factually baseless and highly tendentious accusations of "corruption" and "bias" against his adversaries, his own lawyers, and Laura's court-appointed guardian *ad litem*. Pa304a, 315a, 319a.

- Refusing to furnish "family videotapes" of Laura, which he admitted existed and which would have been relevant to the trial court's findings of fact concerning Laura's mental capacity.

- Walking out of the hearing on his accounting for his service as Laura's fiduciary after two and a half days of evasive and unresponsive testimony. Ja115a. Sal simply walked out of the proceeding, never to return. Instead, he filed a 303-page "RICO" complaint in the United States District Court for the Eastern District of New York, naming as defendants

the attorneys for Serena's adversaries in the New York litigation concerning Henry's estate; all of the attorneys representing adversaries in the New Jersey action; court appointed individuals in both the New York and New Jersey actions; discharged attorneys who had previously represented him in the New Jersey action; and various court officials — most notably, Judge Seybolt. Pa417a, Ja69a.

- Moving in the trial court for Judge Seybolt to recuse himself on the basis of Sal's having named him a defendant in the RICO action. Ja96a.

The RICO action was dismissed in a 42-page Memorandum and Order entered by United States District Judge Thomas C. Platt.[4] Pa570a. Judge Seybolt was represented in that action by the New Jersey Attorney General's office, which moved for dismissal on the basis of judicial immunity and merely sent a letter to the court adopting the arguments of the other defendants moving for dismissal on the merits of the RICO action. With respect to Sal's specific claims against Judge Seybolt, Judge Platt ruled that the United States District Court lacked subject matter jurisdiction and was without authority to review decisions as to state court proceedings pursuant to the *Rooker-Feldman* Doctrine, as well as the Eleventh Amendment to the United States Constitution. Pa583a-587a. Further in his opinion, Judge Platt stated that Judge Seybolt was absolutely immune from Sal's allegations based on the doctrine of judicial immunity. Pa605a-606a. While discussing the Abstention Doctrine as another reason

4. Serena was never a party to the RICO action.

for dismissing Sal's claims against Judge Seybolt, Judge Platt stated: "Plaintiff does not allege facts which support his claim that Judge Seybolt is biased against him, but rather his only basis for this charge is the existence of rulings adverse to his position in the New Jersey action." Pa587a. Sal took no appeal from that dismissal.

Serena and Sal appealed Judge Seybolt's decision to the Appellate Division of the New Jersey Superior Court (hereinafter "Appellate Division"), arguing, *inter alia*, that Judge Seybolt was biased against them. In doing so, they relied on the New Jersey Code of Judicial Conduct, the federal recusal statute, and New Jersey Court Rules. They never raised the issue of Fourteenth Amendment violations. Parkinson and the Foundation cross-appealed on issues of damages. The Appellate Division affirmed Judge Seybolt's judgment in its entirety, noting in its opinion that: "The trial judge exercised remarkable restraint throughout and displayed a clear and constant intent to provide Salvatore ample and adequate opportunity to be heard."

Serena and Sal then petitioned the New Jersey Supreme Court for certification of the issues that had been appealed to the Appellate Division. Parkinson and the Foundation cross-petitioned on issues of damages. The New Jersey Supreme Court denied Serena's and Sal's petitions but granted Parkinson's and the Foundation's cross-petition. Oral argument is scheduled to take place on March 17, 2003.

Neither Serena nor Sal posted a *supersedeas* bond with the trial court to stay execution of the judgment during the appellate process. Accordingly, the judgment was domesticated in New York, where both Serena and Sal are

residents. Execution was effected against Serena for the amount for which she was adjudged liable. Sal, on the other hand, has appealed an order of the Supreme Court of the State of New York, Kings County, that amended a prior order of that court to reflect properly the damages levied against him by Judge Seybolt (App. A1); and the matter is now before the Appellate Division of the Supreme Court of the State of New York, Second Department (App. A4).

For a more exhaustive recitation of the facts of this case, the Court's attention is respectfully invited to the *per curiam* opinion of the Appellate Division at pages A3 through A75 of Salvatore A. Bono's petition.

REASONS FOR DENYING THE PETITIONS

The petitions for writ of *certiorari* should be denied for three discrete reasons.[5]

A. *Certiorari* Is Unwarranted Because Neither the Record nor the Decision Below Raise or Address the Questions Presented by the Petitions.

In reviewing state court judgments under 28 U.S.C. § 1257, this Court adheres to the general rule that it will not consider a petitioner's federal claim unless it was either addressed by or properly presented to the state court that

5. Although the issue of whether or not the trial judge should have recused himself is best left to a merits brief, we are obligated to point out that the petitioners rely on *Republic of Panama v. American Tobacco Co., Inc.*, 217 F.3d 343 (5th Cir. 2000) in support of their arguments for recusal. This Court reversed that case *sub nom.*, *Sao Paulo State of the Federative Republic of Brazil v. Am. Tobacco Co.*, 535 U.S. 229 (2002).

rendered the decision for which the petitioner seeks review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). If the highest state court was silent on the federal question presented to this Court, the assumption is that the issue was not properly presented below. *Id.*; *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983).

Serena never raised the issue of due process in her appeal to the Appellate Division or in her petition for certification to the New Jersey Supreme Court. The sole issues that she raised in those courts were: (1) that she should not have been stripped of a condominium in Florida that the trial court found she had acquired from Laura as a result of undue influence; and (2) that she should not have been assessed surcharges, fees, and damages by the trial court. Neither her appeal nor her petition in the New Jersey state courts ever mentioned an issue with which this Court should be concerned.

In his appeal to the Appellate Division and in his petition for certification to the New Jersey Supreme Court, Sal mentioned the "Fourteenth Amendment" and made vague claims of his being deprived of "due process rights" as the result of adverse rulings by the trial court. Other then complaining that New Jersey law was being misapplied, he did not mention or argue that the trial court's rulings were unconstitutional under the Due Process clause. As this Court stated more than 40 years ago: "We have said time and again that the Fourteenth Amendment does not 'assure uniformity *** of judicial decisions *** (or) immunity from judicial error ***' [Citation omitted.] Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." *Beck v. Washington*, 369 U.S. 541, 554-55 (1962).

Significantly, the Appellate Division did not address Sal's vague utterances concerning "due process"; and the New Jersey Supreme Court denied his petition for certification. It must therefore be assumed that he did not present the issue properly. *Adams v. Robertson*, *supra* at 86; *see also*, *Crowell v. Randell*, 35 U.S. 368 (1836), wherein Justice Story stated:

> In the interpretation of this section of the act of 1789, it has been uniformly held, that to give this court appellate jurisdiction two things should have occurred and be apparent in the record: first, that some one of the questions stated in the section did arise in the court below; and secondly, that a decision was actually made thereon by the same court, in the manner required by the section. If both of these do not appear on the record, the appellate jurisdiction fails.

Id. at 392.

This Court, in exercising its appellate jurisdiction, will consider questions not pressed or passed upon in the courts below only in exceptional cases *that come from the federal courts*. *McGoldrick v. Companie Generale Transatlantiqe*, 309 U.S. 430, 434 (1940). This case, of course, comes from the New Jersey state courts. This Court should therefore not depart from this practice in the exercise of its appellate jurisdiction.

B. *Certiorari* Is Unwarranted Because the Petitioners Seek Review of an Unpublished Opinion of an Intermediate State Appellate Court That Has No Precedential Value.

New Jersey Court Rule 1:36-3 provides in pertinent part: "No unpublished opinion shall constitute precedent or be binding upon any court." Accordingly, other New Jersey courts considering issues similar to those below may possibly reach different conclusions, especially since the finding of undue influence on the part of Serena and Sal turned so much on issues of fact.

"Where an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not 'lightly overturn' the concurrent findings of the two lower courts." *Easely v. Cromartie*, 532 U.S. 234, 242 (2001). The Appellate Division affirmed the judgment of the trial court only after an exhaustive review of the trial court's factual findings. The petitioners have not presented reasons why this Court should revisit those findings.

Given the fact intensity of the issues of which the petitioners complain and the absence of precedential effect of the decision below upon any other case or controversy, there is no reason why this Court should grant *certiorari*.

C. *Certiorari* Is Unwarranted Because the Judgment Below Is Not Final as to All Issues Among the Parties.

This Court's ability to review state court decisions is limited to final judgments rendered by the highest court of that state. *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 77 (1997). This principle serves the purpose of preventing piecemeal review of state court decisions. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). All rights must be fully adjudicated, and the adjudication should not be subject to further review by a state court. *Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 268 (1942). "[T]he rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." *Collins v. Miller*, 252 U.S. 364, 370 (1920).

The rights and obligations among the parties to this case are currently under review in the appellate courts of two states. The cross-appeal of Parkinson and the Foundation on issues of damages is currently before the New Jersey Supreme Court and scheduled for oral argument. Following the domestication in New York of the judgment of the New Jersey trial court, Sal has appealed the amount of the New Jersey judgment to the Appellate Division of the New York Supreme Court.

Given his history in these proceedings, it is likely that Sal will again petition this Court to review the matters currently under consideration by the New Jersey and New York appellate courts should they rule against him. Likewise, if Serena remains true to form, she will follow suit.

Accordingly, neither petition is ripe for *certiorari*.

CONCLUSION

The petitions for a writ of *certiorari* should be denied.

Respectfully submitted,

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Counsel of Record
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APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS DATED AND FILED JULY 11, 2001

At an IAS Term, Part 44 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of July, 2001.

PRESENT:

HON. L. PRISCILLA HALL,

Justice.

Index No. 26439/00

GEOFFREY M. PARKINSON,
Trustee of the Laura J. Niles Trusts,

Plaintiff,

-against-

SALVATORE BONO,

Defendant.

Upon the foregoing papers, the plaintiff seeks an order of this court, pursuant to CPLR 5019, modifying the foreign judgment entered against the defendant on August 2, 2000 in the amount of $526,296.00 to reflect the correct judgment amount of $805,727.00, plus simple interest at a rate of five

percent, as set forth in the March 24, 2000 Amended Judgment issued by the Honorable Harry K. Seybolt, Judge, Superior Court of New Jersey, Chancery Division, Warren County, Probate Part.

Defendant opposes the motion contending that the proposed amendment of the order will affect his substantive rights in violation of CPLR 5019, because it will increase the judgment by nearly fifty percent. Further, defendant contends that the plaintiff has no standing, that the foreign judgment is unclear on critical issues, that the motion papers are unsupported by an affidavit of personal knowledge and that the plaintiff has not presented good cause or statutory authority for the relief sought.

This court finds the order of Judge Seybolt to be clear on its face. The amendment, rather than affecting defendant's substantive rights, simply affirms the amount which he was ordered to pay to the plaintiff in Judge Seybolt's order. The issue of standing was determined in favor of the plaintiff in this court's previous decision and the motion papers are sufficiently supported by the affidavits which are contained therein. The plaintiff has demonstrated that the amount of the judgment entered against the defendant on August 2, 2000 was incorrect and that modification to reflect the correct amount is appropriate.

The plaintiff's motion modifying the foreign judgment entered against the defendant on August 2, 2000 in the amount of $526,296.00 to reflect the correct judgment amount of $805,727.00, plus simple interest at a rate of five percent, as set forth in the March 24, 2000 Amended Judgment issued

by the Honorable Harry K. Seybolt, Judge, Superior Court of New Jersey, Chancery Division, Warren County, Probate Part is granted. The entry of this judgment against the defendant, Salvatore Bono, is without prejudice to the right of plaintiff, as Trustee of the Laura J. Niles Foundation to seek recovery in the future of further monies from defendant, Salvatore Bono, depending upon the final outcome of the pending appeal of Serena Bono-Niles from the Amended Judgment of the New Jersey Court.

The following constitutes the order, decision, and judgment of the court.

ENTER

Hon. L. Priscilla Hall
J.S.C.

APPENDIX B — NOTICE OF APPEAL OF THE DEFENDANT SALVATORE BONO TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK DATED SEPTEMBER 12, 2001 AND FILED SEPTEMBER 13, 2001

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index Number 26439/00

GEOFFREY M. PARKINSON,
Trustee of the Laura J. Niles Trusts,

Plaintiff,

SALVATORE BONO,

Defendant.

NOTICE OF APPEAL

SIRS:

PLEASE TAKE NOTICE that the defendant Salvatore Bono appeals to the Appellate Division of the Supreme Court, Second Department, from the order of the Supreme Court, Kings County (L. Priscilla Hall, *J.*) dated July 11, 2001, and entered in the office of the clerk of Kings County on July 31, 2001. The order was served with notice of entry on August 13, 2001. Defendant appeals from each and every part of the order and the whole thereof; both on questions of law and fact.

Appendix B

DATED: New York, New York
September 12, 2001

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(3)

No. 02 1038

Supreme Court, U.S.
FILED
MAR 24 2003
OFFICE OF THE CLERK

In the

Supreme Court of the United States

SALVATORE A. BONO,

Petitioner,

v.

GEOFFREY M. PARKINSON and THE LAURA J. NILES FOUNDATION, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE

Bono adequately set forth the pertinent facts in his statement of the case in the petition for certiorari. However, he cannot permit some of the statements set forth in the respondents' statement of the case to remain unchallenged:

- Judge Seybolt's decision to enter a default against Bono was not based upon a full year of allegedly abusive litigation conduct (brief in opposition p. 4). The motion for a default, of which Bono had no notice, complained only of Bono's alleged failure to appear at a continuing deposition.

- The respondents' assertion that Judge Seybolt selected Mr. Selvaggi as guardian ad litem is demonstrably false, as the order to show cause they refer to (Pa2a) has Mr. Selvaggi's name typed in - he was thus clearly selected by Parkinson's attorney, not the lower court.

In addition, the respondents' brief in opposition does not controvert that Judge Seybolt continued to sit on the case after taking an adverse position against Bono in a related litigation.

REASONS FOR GRANTING THE WRIT

Rather than address the serious constitutional issues raised by Bono's petition, the respondents rest their opposition to this Court's review of the New Jersey judgment on procedural technicalities. This Court should reject these specious arguments, accept review, and address Bono's due process claims on the merits. Contrary to the respondents' assertions, the judgment is final for purposes of review in this Court because the federal issues were conclusively determined,

the issues raised by the petition were properly preserved according to New Jersey law, and the issues are of great significance.

POINT I **BECAUSE THE SUPREME COURT OF NEW JERSEY HAS DENIED REVIEW WITH RESPECT TO THE FEDERAL ISSUES RAISED BY BONO, AND ANY MATTER REMAINING UNRESOLVED IN THE NEW JERSEY STATE COURTS CANNOT AFFECT THE FEDERAL ISSUES, THE APPEAL IS RIPE FOR REVIEW BY THIS COURT.**

(Responding to Point C of the respondent's brief in opposition).

This Court has held that it will review state court judgments even if the state court judgment remanded the matter for trial, if the federal issues have been conclusively decided and there is no chance that the remand will raise any additional federal issues. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). Contrary to position asserted by the respondents (brief in opposition p. 11), the judgment is final for purposes of appeal to this Court. In arguing otherwise, the respondents state general principles of law as to finality without acknowledging the exceptions established by this Court. The present case falls within the exception for situations in which the federal claims sought to be reviewed in the Supreme Court will not be further reviewed by the state court.

A. The Appeal in the New York State Courts Is No Longer Pending.

The respondents argue that there are two pending state court proceedings, (1) the respondents' appeal to the New Jersey Supreme Court, and (2) Bono's appeal in the New York courts of the docketing of the New Jersey judgment in New

York. (brief in opposition pp. 6-7, 11). The latter appeal was decided by the New York State Supreme Court, Appellate Division on December 30, 2002. *Parkinson v. Bono*, __ A.D.2d ___, 751 N.Y.S.2d 884 (N.Y. App. Div. 2002). Bono has not sought leave to appeal this order to the New York Court of Appeals. That proceeding has been finally determined.[1]

B. The Respondents' Appeal to the New Jersey Supreme Court on an Unrelated State-law Issue Does Not Render the Judgment Non-final for Purposes of Bono's Request for Review in this Court.

As for the New Jersey proceedings, the only issues that remain on appeal to the New Jersey Supreme Court are state-law issues concerning the authority to grant attorney's fees in an action for an accounting, and the propriety of the amount of the fee award in this case. The question of fees have nothing to do with the question of whether a litigant is entitled to litigate before an unbiased tribunal.

The respondents arrive at their erroneous conclusion that this Court lacks jurisdiction to hear the appeal because they fail to distinguish between the petitioner's appeal below

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[1] Bono must also take issue with the respondents' characterization of his appeal in New York. He did not appeal the amount of the New Jersey judgment (brief in opposition p. 11), but challenged the authority of the Kings County clerk to enter a foreign state judgment that was not clear on its face, and he also challenged the authority of the court to amend the judgment by increasing it nearly 50%.

and their own appeal to the New Jersey Supreme Court. Only Bono and Niles raised federal questions on appeal before the New Jersey state courts. Parkinson and the Foundation raised only state-law issues concerning the alleged inadequacy of the damages award. The New Jersey Appellate Division affirmed the Superior Court's judgment in toto. With respect to the respondents' cross-appeals concerning the alleged inadequacy of the damages, it deferred to the trial court's "feel for the case. " (A. 75). As even the respondents concede, the New Jersey Supreme Court denied Bono's petition for certification - it determined that it would not review the federal claims Bono now advances before this Court. The door to review of the federal claims in the New Jersey courts was shut when that state's highest court denied Bono's petition for certification. The New Jersey Supreme Court granted certification to the respondents, who raised only the issue of the adequacy of the compensatory damages.

By failing to distinguish between the federal claims asserted by Bono and their own claims which arise solely from state law, the respondents ignore a well-established line of cases that treat state court orders as final when no additional federal claims can be reviewed in state court. In *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945), a Nebraska fraternal organization created to own a radio station leased the station to a corporation. They jointly applied to the Federal Communications Commission for consent to transfer the station license. A member of the fraternal organization sued, alleging the lease and assignment of the license should be set aside as fraudulent. *Johnson* at 121. The FCC consented to the transfer. The trial court found no fraud and dismissed the suit. The Nebraska Supreme Court reversed, directed that the license and lease be set aside, and that the parties be restored to their original positions. *Johnson*, 326 U.S. at 122. On

motion for hearing, the station and the fraternal organization argued that the state courts had no jurisdiction to overrule the FCC's consent to the transfer. When the Nebraska Supreme Court denied the motion, the station and the organization filed a petition for certiorari. This Court held that the order was final because all that remained in the state court was an accounting, which could not give rise to a federal claim. *Johnson* at 127.

Acceptance of jurisdiction by this Court advances, rather than impedes, the efficient use of judicial resources. The basis for the rule against reviewing interlocutory judgments is to prevent piecemeal litigation to this Court. *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). This is not implicated in this case. This Court could reverse the judgment, holding it infirm under the Due Process Clause. In that event, the appeal to the New Jersey Supreme Court on the issue of damages would be rendered moot. If this Court affirms the entry of the judgment, the New Jersey Supreme Court will simply decide the appeal before it concerning damages. This Court may only review a state court judgment if a federal question is raised. 28 U.S.C. § 1257(a). Review of Bono's claim will not impact the grounds for the finality rule. Following *Johnson*, this Court reaffirmed this principal of jurisdiction in *North Dakota State Board, supra*. In that case, the North Dakota Supreme Court held that a statute which required that if a corporation applies to operate a pharmacy, the majority of the stock must be owned by registered pharmacists in good standing. *Id.* at158. The Nebraska Supreme Court remanded the matter to the State Board for a determination of the application. This Court held that the judgment was final notwithstanding the remand because even if the respondent was denied a license upon remand, that denial would be strictly on state grounds, and could not be further reviewed to the Supreme Court.

This Court has held that when a state's highest court rejects a challenge to the constitutionality of a statute and remands for a determination of damages, the judgment with respect to the constitutionality is final for purposes of appeal to this Court. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 246 (1974). The present case invokes the same posture because the New Jersey Supreme Court, by denying Bono's petition for certification, upheld the constitutionality of the judgment. The only issue remaining as the result of the New Jersey Supreme Court's grant of certification to Parkinson and the Foundation is damages. Therefore, the petition should not be denied on the grounds of alleged lack of finality.

The cases relied upon by the respondents (brief in opposition p. 11) are inapposite. In *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997), the state Supreme Court issued an interlocutory decision answering one certified question as to whether punitive damages were recoverable in a wrongful death action where the complaint also asserted claims under 42 U.S.C. § 1983, under which punitive damages against a municipality are not recoverable. *Id.*, at 81. The Court dismissed the petition for writ of certiorari on the grounds that the state court judgment was not final. Unlike the present situation where only state law issues remain and those issues cannot affect the resolution of the federal issues, the resolution of the state-law claims in *Jefferson* has the potential to moot the federal claims. *Jefferson* at 82. The respondents also cite to *North Dakota State Board*, where, as discussed above, this Court actually accepted jurisdiction, rejecting a challenge that the judgment was not final.

In *Collins v. Miller*, 252 U.S. 364, 367 (1920) (brief in opposition p. 11), unlike the present case, the lower court order

left federal issues to be resolved. *Collins* concerned an appeal from the denial of a portion of a petition for a writ of habeas corpus. The petition in *Collins* had been brought to review multiple criminal charges. The Court held that the judgment was not final because the matter had been remanded with respect to some of the charges. Unlike the present case, what was left to be decided in *Collins* were the very federal issues that gave rise to the petition for writ of habeas corpus in the first place, albeit on only some of the original charges. Finally, *Department of Banking, State of Nebraska v. Pink*, 317 U.S. 264 (1942) (brief in opposition p. 11) held only that an application to clarify a state court judgment does not toll the time to file a petition for a writ of certiorari. *Id.*, at 268. *Pink* is inapplicable because there is no dispute that Bono timely filed his petition with this Court.

The respondents should not be permitted to succeed on their argument that their own appeal of the New Jersey Appellate Division order on the issue of damages must delay Bono's right to seek review in this Court. Because the respondents' appeal to the New Jersey Supreme Court concerns only state law issues, the judgment is final for purposes of review in this Court.

POINT II **BONO'S CLAIMS ARE RIPE FOR REVIEW IN THIS COURT.**

(Responding to Point A of the brief in opposition).

The respondents misrepresent the facts and the law when they argue that this Court may not review Bono's claims because they were allegedly not presented to the state courts. This Court's precedent requires no more than that a petitioner present claims in the manner required by state law. Under

New Jersey law, Appellate Courts will reach issues raised for the first time on appeal if the issue is one of great public importance. Bono's due process claims raise arguments of great public importance concerning the right to notice and the opportunity to be heard by an impartial magistrate such that it was entirely possible to raise them with more particularity for the first time in the New Jersey Supreme Court. In any event, Bono's briefs before the Appellate Division and the petition for certification to the Supreme Court addressed the due process claims Bono now seeks to raise before this Court.

A. Bono Presented the Claims in the Manner Provided for by New Jersey Law Because New Jersey Appellate Courts Will Review Issues Raised for the First Time on Appeal If They Are of Great Public Importance.

A claim is properly raised in a state court for purposes of review by this Court if it is raised in the time and manner provided for under state law. *Adams v. Robertson*, 520 U.S. 83, 87 (1997), *citing Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). Under New Jersey law, appellate courts will in fact review claims raised for the first time on appeal if the issue presented is of sufficient public concern. *Alan J. Cornblatt, P.A. v. Barow*, 153 N.J. 218, 230, 708 A.2d 401, 407 (1998); *Nieder v. Royal Indmnity Ins. Co.*, 62 N.J. 229, 233, 300 A.2d 142, 145 (1973). The issue of whether a judge may wear two hats - litigant and arbiter, is of great importance to the integrity of the judicial system. The New Jersey courts therefore had the power to review these issues, and by extension, so does this Court.

B. The Briefs Before the Appellate Division and the Petition for Certification to the New Jersey Supreme Court Sufficiently Apprised the Respondents of the Due Process Claims.

In any event, the briefs in the Appellate Division and the Supreme Court petition for certification sufficiently placed the court and the adversaries on notice that Bono was raising a federal due process claim. The Court must look to the overall gist of the briefs in determining whether the claims of lack of notice and judicial impartiality were described in the papers before the New Jersey state courts. *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) (manner in which the petitioner's Sixth Amendment claim was asserted in the state court made it appropriate for the Supreme Court to accept jurisdiction even though no explicit Sixth Amendment or constitutional issue was raised in the state courts.) Here, the tenor of Bono's state court briefs demonstrate that he was identifying and raising a claim under the due process clause of the fourteenth amendment.

1. The Claim That Judge Seybolt Violated Bono's Due Process Rights by Ignoring Various Procedural Rules Was Preserved.

Bono's briefs before the Appellate Division indicate that Bono claimed that the cumulative effects of the trial judge's rulings deprived him of a his fundamental right to a fair trial, i..e, his due process rights. Among these errors was the short notice prior to holding Bono in default, the refusal to permit Bono to participate in the damages phase of the trial, and Judge Seybolt's decision to continue to sit on the case after taking an active role in a separate litigation against Bono.

Furthermore, Point II of the petition for writ of certiorari argues that this Court should review the judgment to address whether a litigant's due process rights are violated when a trial judge repeatedly ignores state procedures and rules designed to afford litigants a fair opportunity to present and defend claims. Among the procedural defects identified in the petition to this Court were Judge Seybolt's entry of a default on short notice and Bono's lack of notice that he would be subject to surcharge. (Petition pp. 25-29). These same issues were succinctly raised at Point V of Bono's appellant's brief to the New Jersey Appellate Division. There, Bono alleged that the trial court deprived Bono of his due process rights as the result of the entry of the default on short notice and the refusal to permit Bono to participate in the damages phase of the trial. The point heading itself raises a due process claim:

> The decision to enter default without proper notice, as required by rule 1:6-3, the failure to consider less drastic remedies, and the total exclusion of bono and his attorney from any participation in the proofs hearing and damages hearing, *violate his due process rights* and his rights under New Jersey law and require reversal.

(Appellant's brief to Appellate Division, Point V) (emphasis added). Subdivision B of Bono's principal brief to the Appellate Division further delineates Bono's due process argument. (Bono brief to Appellate Division).

Bono continued to press the due process arguments in his petition for certification to the New Jersey Supreme Court. Point III of his petition to that court argued he should be granted certification because by allowing a judgment to be

entered for relief not sought in the complaint, based upon short notice, without participation of the defendant, violated due process. (Petition for certification p. 13). The argument under this point heading decries the fact that, were the Appellate Division's rationale to be accepted, a defaulting party will be subject to damages without notice, violating due process. Because Bono's brief addressed the question of whether the lack of notice and opportunity to be heard before entering a default judgment against Bono violated his due process rights, the issue is ripe for review in this Court.

2. The Claim That Judge Seybolt Violated Bono's Due Process Rights by Refusing to Recuse Himself Was Preserved.

The claim that Judge Seybolt's failure to recuse himself deprived Bono of his right to due process was also raised in the New Jersey courts. The conclusion paragraph of Bono's brief to the Appellate Division argues that the cumulative effect of the trial judge's errors including Judge Seybolt's refusal to recuse himself, violated Bono's due process rights:

> Bono was deprived of the fundamental protections of due process and his substantive rights at every phase of the proceeding and a double standard was applied by the court to the detriment of Bono . . . Finally, Judge Seybolt made many of these extreme rulings after he became a defendant in a Federal lawsuit brought by Bono against him and the other parties to this litigation and the Judge was litigating against Bono in that related case. Because of the appearance of bias, Judge

Seybolt was required to but refused to recuse himself.
(Bono brief to Appellate Division).

In his petition for certification to the Supreme Court of New Jersey, Bono asserted that "[c]ertification should be granted in this case because the Appellate Division's decision results in the violation of a litigant's due process rights, ..." (Petition for certification p. 7). Bono's petition for certification further asserted that "a court's impartiality is the very bedrock of constitutional due process, ..." (Petition for certification p. 9).

Bono's arguments to this Court concerning the violation of due process are the same arguments he made before the Appellate Division and the Supreme Court. Because Bono made these arguments before the New Jersey courts, they were preserved for review by this Court.

C. Because the Appellate Division Issued a Summary Order Without Discussion, it Cannot Be Said That the Failure to Address the Due Process Claims in the Order Meant That They Were Not Raised, and in Any Event, Bono Rebutted the Presumption.

Unable to rely upon what the papers in the courts below actually said to support their assertion that these issues were not preserved, the respondents argue that the issues were not raised because they were not addressed by the Appellate Division. (brief in opposition p. 8). But the Appellate Division specifically stated in its opinion that it did not believe Bono's claims merited extensive discussion in a written opinion, invoking N.J. Ct. R. 2:1-3(E). (A. 65). The

Appellate Division, therefore, failed to mention the due process claims, not because Bono did not raise them, but because the Appellate Division believed that they had no merit. This cannot form the basis for a claim of lack of preservation.

In any event, as this Court stated in *Adams*, even if the state court does not mention the federal issue, the petitioner can rebut the presumption by establishing that it was properly presented. *Adams*, 520 U.S. at 87. That the petitioner in *Adams* did not meet this burden does not require a finding that Bono has not met it. Here, Bono's appellant's brief and petition for certification raised the issues sought to be reviewed in this Court.

POINT III **CONTRARY TO THE RESPONDENTS' CLAIMS, THE ISSUES IN THIS CASE ARE SUBSTANTIAL AND WORTHY OF THIS COURT'S REVIEW, REGARDLESS OF WHETHER THE APPELLATE DIVISION'S ORDER WAS UNPUBLISHED.** (Responding to point B of the brief in opposition).

Contrary to the respondent's contention, the fact that the Appellate Division declined to publish its opinion affirming the judgment does not mean that the issues in this case are unimportant, or are not worthy of this Court's review. *Easley v. Cromartie*, 532 U.S. 234 (2001) (brief in opposition p. 10) is inapposite. The Court in *Easley*, after making the general statement that appellate courts will not lightly overturn factual findings, did make new findings. *Easley* at 243. In any event, Bono is not asking this court to overturn factual findings. There is no dispute about the facts insofar as relevant to the issues sought to be reviewed. There is no dispute that

Judge Seybolt denied Bono's application to recuse himself after his counsel filed pleadings in the federal action taking a position concerning Bono's federal conduct. There is also no factual dispute that Parkinson's motion for a default judgment was faxed to Bono's counsel the day before the return date of the motion.

Bono's petition to this Court raised issues that go to the very heart of the judicial process, including the integrity of judicial proceedings and the right of a party to have ample notice in order to present defenses to claims. Regardless of whether the Appellate Division decision has precedential value under New Jersey rules, Bono's due process claims are of interest to more than himself. This Court has previously granted petitions for certiorari on appeals from unpublished opinions. Earlier this month, the Court decided *Ewing v. California*, ___ U.S. _____, 123 S.Ct. 1179 (March 5, 2003) on petition for a writ of certiorari to the California Court of Appeal. The procedural posture of this case is identical to *Ewing*. In *Ewing*, the petitioner's conviction was affirmed by the California Court of Appeal (like the New Jersey Appellate Division, an intermediate appellate court) in an unpublished opinion. *Ewing* at 1185. California, like New Jersey, has a rule precluding citation to unpublished opinions other than for the purpose of res judicata, collateral estoppel, or law of the case. Cal. Rule of Court 977. The California Supreme Court denied Ewing's petition for review, just as the New Jersey Supreme Court denied Bono's petition for certification. *Ewing* at 1185. Despite the fact that the appeal was from an unpublished opinion, this Court granted certiorari because of the importance of the Eighth Amendment issue involved. 535 U.S. 969 (2002). *See also Clark County School District v. Breeden*, 532 U.S. 268 (2001) (Court granted certiorari to review unpublished decision of the United States Court of

Appeals for the Ninth Circuit). If, as the respondents claim, this Court should not determine any issue decided in an unpublished order, numerous important issues will escape review. Most state and federal courts have rules regarding the precedential effect of unpublished opinions. Under the respondents' theory, these cases would never be subject to this Court's review. There is no authority for the proposition that this Court cannot review unpublished orders.

Moreover, the respondents' claim rings hollow when they themselves sought review of this allegedly unimportant, unpublished opinion in the New Jersey Supreme Court. Apparently, to the respondents' hypocritical way of thinking, the unpublished Appellate Division order is important enough to be reviewed by the New Jersey Supreme Court - on an issue decided adversely to them - but not important enough to justify review in this Court on the issue that was decided in their favor.

A litigant's right to have a case decided by an impartial magistrate is fundamental. So is the concept that a party may not be subject to damages without notice and an opportunity to be heard. The fact that the Appellate Division decided not to publish its opinion does not preclude this Court from reviewing the order to decide the due process ramifications of a trial judge's refusal to grant recusal after affirmatively taking a position against the litigant in another proceeding, as well as whether entering a judgment on default on short notice, for relief not sought in the complaint, and after refusing to permit participation in the damages portion of the hearing violated due process. The integrity of the judicial process is at stake. No judicial system can survive if the arbiters are viewed as biased or are in fact biased. Regardless of whether the Appellate Division order may be cited as precedent, the due

process issues raised by this appeal are of concern to litigants throughout the nation. This Court should grant the petition and decide these issues.

CONCLUSION

Bono was deprived of fundamental protections of due process and his substantive rights at every stage of the proceedings in state court, and this court should grant review to address these issues. The federal issues were conclusively resolved by the state court, and the respondents' allegations of lack of finality is no bar to review. The issues were sufficiently raised by Bono in the state court, and they are sufficiently important to merit review. The Petition for a Writ of Certiorari should therefore be granted.

Dated: March 19, 2003

Respectfully submitted,

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